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No. 93-1108

Supreme Court, U.S.
FILED

IN THE 93 1379 FEB 28 1994

Supreme Court of the United States

OCTOBER TERM, 1993

RURAL WEST TENNESSEE AFRICAN-AMERICAN AFFAIRS COUNCIL, INC., MINNIE BOMMER, JEAN CARNEY, DR. C.T. BOYD, BRENDA WOODS, SHIRLEY KEE, ANNA FAYE MOORE, REV. WILLIAM SMART, AND DR. WARREN DICKERSON,

Appellants,

v.

NED MCWHERTER, GOVERNOR OF TENNESSEE, JOHN WILDER, LIEUTENANT GOVERNOR AND SPEAKER OF THE TENNESSEE SENATE, JAMES NAIFEH, SPEAKER OF THE TENNESSEE HOUSE OF REPRESENTATIVES, WILL BURNS, COORDINATOR OF ELECTIONS, AND LENITA MCGRAW, JANET BLACK, JUDY BISHOP, ELLA MAE ESQUE, SPENCE DUPREE, BOBBY WHITE, AND LINDA BURNETT, REGISTRARS OF FAYETTE, HARDEMAN, HAYWOOD, LAUDERDALE, MADISON, SHELBY, AND TIPTON COUNTIES,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE

JURISDICTIONAL STATEMENT

LAUGHLIN MCDONALD*
NEIL BRADLEY
MARY WYCKOFF
American Civil Liberties Union Foundation, Inc.
44 Forsyth St. NW -Suite 202
Atlanta, GA 30303
(404) 523-2721

RICHARD DINKINS
WILLIAMS AND DINKINS
203 2nd Avenue North
Nashville, TN 37201
(615) 244-3988

BRUCE KRAMER
Cooperating Attorney
American Civil Liberties Union Foundation of Tennessee, Inc.
BOROD & KRAMER
80 Monroe — 7th Floor
Memphis, TN 38103
(901) 524-0221

KEENAN KELLER
DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, NY 10017
(212) 450-4933

* Counsel of Record

QUESTIONS PRESENTED

The three-judge district court found that Tennessee's 1992 state Senate redistricting plan violated Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. The court, however, failed to order a full and complete remedy for the violations that it found. The questions presented are:

1. Whether, under Section 2, total population, rather than voting age population, is the appropriate numerical basis for judging the representative fairness of a redistricting plan?

2. Whether, after a finding of liability under Section 2, a court can use the proportionality disclaimer found in subsection (b) of the Act as a remedy cap?

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE

JURISDICTIONAL STATEMENT

Appellants, the Rural West Tennessee African-American Affairs Council and eight African-American residents and registered voters in Tennessee, appeal from a judgment of a three-judge district court holding that the state of Tennessee was required to draw only one additional majority-minority state Senate district to remedy dilution of African-American voting strength, in violation of Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, in its 1992 state Senate redistricting plan.

OPINION BELOW

The opinion of the three-judge United States District Court for the Western District of Tennessee (J.S. App. at 1a-32a) is reported at 836 F. Supp. 453.

JURISDICTION

The judgment of the district court was entered on November 4, 1993. J.S. App. at 2a-3a. A timely motion to alter or amend the judgment was denied on November 29, 1993. J.S. App. at 33a-34a. A timely notice of appeal was filed in the district court on December 28, 1993. J.S. App. at 35a.

The jurisdiction of the three-judge district court was invoked under 28 U.S.C. §§ 1331, 1343(a)(4), and 2284. J.S. App. at 40a. The appellate jurisdiction of this Court is invoked under 28 U.S.C. § 1253.

STATUTORY PROVISIONS INVOLVED

Section 2 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process

and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

STATEMENT

Appellants, Rural West Tennessee African-American Affairs Council[1] ("RWTAAAC") and eight individual African-American residents and registered voters of Tennessee, filed suit against the State of Tennessee on May 15, 1992, challenging the entire 1992 Tennessee state Senate redistricting plan. Appellants' allegations focussed on the redistricting plan's dilutive effects in southwestern Tennessee, because that was the area of the state in which additional majority-black districts could be drawn. Appellants alleged that the 1992 state Senate redistricting plan violated Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, and several amendments to the United States Constitution.[2] Jurisdictional Statement Appendix ("J.S. App.") at 39a-40a. The RWTAAAC specifically alleged that the state Senate redistricting plan diluted minority voting strength by fragmenting or packing the African-American population of the seven counties in southwestern Tennessee[3] so that African-Americans are the

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1. The Rural West Tennessee African-American Affairs Council, Inc. is a non-profit Tennessee corporation established to promote voter registration, education, and political participation. It has no parent companies or subsidiaries. The Memphis Branch NAACP intervened in this action but is not a party to this appeal.

2. The RWTAAAC's complaint also alleged that the state's 1992 redistricting plan for the Tennessee House of Representatives violated Section 2. J.S. App. at 42a. That claim, however, is not at issue in this appeal.

3. In challenging the entire 1992 Tennessee state Senate redistricting plan, Appellants alleged that specific dilutive effects took place in the seven counties of southwestern Tennessee: Fayette, Hardeman, Haywood, Lauderdale, Madison, Shelby, and Tipton Counties.

majority in only two districts, "although it is possible to draw at least four (4) reasonably compact and contiguous senate districts in the seven county area that contain a majority of African-American residents." J.S. App. at 42a. Appellants alleged a statewide pattern of discrimination against blacks, including discrimination in voting, J.S. App. at 43a, and introduced substantial evidence in support of their statewide allegations. *See, e.g.*, Pl. Ex. 11, Plaintiffs' First Request for Judicial Notice as to Law and Judicial Decisions; *see also* Pl. Exhs. 50-56, 69.[4] Citing racial polarization in voting and other factors, Appellants alleged that "the newly enacted legislative districting in Tennessee dilutes the voting strength of African-Americans," J.S. App. at 43a, and that "African-Americans in southwestern Tennessee have less opportunity than white residents to participate in the political process and elect candidates of their choice." *Id.*

Appellant RWTAAAC's suit was consolidated with a redistricting suit filed by another group of plaintiffs (the *Langsdon* plaintiffs), who challenged the 1992 Tennessee state House redistricting plan on Fourteenth Amendment, Voting Rights Act, and other grounds.[5]

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4. Pl. Ex. 11 was a compilation of laws and judicial decisions, many of which were of statewide application. Pl. Ex. 50 showed voting, election, poll tax, population, political party, and black population statistics for the state as a whole. Pl. Ex. 56, a report of the U.S. Commission on Civil Rights, showed black office holders throughout the state as of February 1, 1968. Other exhibits showed statewide census data by race, voter registration, and state requirements for registration and voting.

5. Prior to trial on the merits, the three-judge court declared in summary judgment that the state House redistricting plan violated the Equal Protection Clause of the Fourteenth Amendment. *Langsdon* v. *Milsaps*, 836 F. Supp. 447 (W.D. Tenn. 1993). The court concluded that this finding rendered the RWTAAAC challenge to the House redistricting plan moot. However, on February 23, 1994, the three-judge court reserved judgment on a newly-enacted remedial state House plan in light of the issues involved in these appeals concerning the state Senate redistricting plan. J.S. App. at 37a-38a.

Applying the framework established by this Court in *Thornburg* v. *Gingles*, 478 U.S. 30, 50-51 (1986), the three-judge district court concluded that "it is clear that the 1992 Senate reapportionment plan violates § 2 of the Voting Rights Act." J.S. App. at 29a. Addressing the first prong of the *Thornburg* v. *Gingles* threshhold test, the court found that the African-America communities in urban Shelby County and rural west Tennessee were sufficiently large and geographically compact to draw additional majority African-American state Senate districts in each area. J.S. App. at 4a. The court made both statewide and rural west Tennessee specific findings addressing the dilutive effects of the state Senate redistricting plan. The court noted that Appellants "presented strong evidence of racially polarized voting, the most important [*Gingles*] factor." *Id.* The court found racial polarization in voting in six of the seven rural county elections, with "overwhelming" polarization in five of those contests, and comparable levels of polarization in urban Shelby County. J.S. App. at 9a. In west Tennessee, the three-judge court found "a high level of white bloc voting which usually enables the majority to defeat the black community's candidate of choice." *Id.*

Political cohesion of the African-American community, the second *Gingles* factor, was never at issue. The three-judge court noted that the parties stipulated that African-American communities in rural west Tennessee and Shelby County are politically cohesive. J.S. App. at 7a. The court also made findings indicative of statewide African-American voter cohesion and vote dilution. The court found that "Tennessee has a long history of official racial discrimination in voting. Although the worst discrimination is in the past, effects of past discrimination are still apparent . . . ." J.S. App. at 15a. Slavery was "officially sanctioned" throughout the state prior to the Civil War. *Id.* In 1834 the state Constitution was amended to deny the right to vote even to free black men. *Id.* at 16a. Following Reconstruction and

the advent of Jim Crow, blacks were again effectively disfranchised on a statewide basis in Tennessee. *Id.* The state legislature passed laws in 1889 and 1890 of statewide application requiring voter registration; separate ballot boxes for local, state and national elections; single, nonpartisan ballots; and a poll tax. "These laws had the primary purpose and effect of reducing black political participation." *Id.*[6]

After examining the "totality of the circumstances," the three-judge court ruled that the 1992 state Senate reapportionment plan:

> violates Section 2 by affording black voters in west Tennessee less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

J.S. App. at 30a. The court found that: "[I]n west Tennessee there is a history of official discrimination against blacks in voting which has present-day effects, and that official discrimination in voting is not entirely in the past." J.S. App. at 18a. The Court also found that the lingering effects of discrimination upon the educational and economic status of African-Americans contributed to the lack of success of African-American candidates and supported a finding of vote dilution. J.S. App. at 30a. Taking into account statewide voting patterns and cohesion, the Court held that "the lack of black electoral success in Tennessee is a factor which weighs in favor of a finding of vote dilution." J.S. App. at 19a. The

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6. Courts have traditionally relied upon evidence of this kind to prove racial bloc voting and political cohesion. *See Nevett* v. *Sides*, 571 F.2d 209, 223 n.18 (5th Cir. 1978), *cert. denied*, 446 U.S. 951 (1980) (racial bloc voting may be shown by, among other things, "the 'existence of past discrimination in general.' "(quoting *Zimmer* v. *McKeithen*, 485 F.2d 1297, 1305 (5th Cir. 1973), *aff'd*, 424 U.S. 636 (1976)).

court found that "no black from a majority-white district has won a seat in the state Senate this century," J.S App. at 21a. The court concluded that "the level of black electoral success in the state Senate indicates that the Senate reapportionment plan will result in minority vote dilution." *Id.*

African-Americans in Tennessee account for 16.0% of the state's total population and 14.4% of its voting age population ("VAP"). Whites account for 83.0% of the state's total population and 84.7% of its VAP. Drawing two additional majority-minority districts in southwestern Tennessee to fully remedy the three-judge court's findings of vote dilution would result in a total of five majority African-American districts in the 33 member state Senate, or 15.2% of the total seats. Thus, African-Americans statewide would be 5.02% "underrepresented" as measured by total population and 5.47% "overrepresented" by VAP. The remaining 28 state Senate districts would have white majorities, accounting for 84.8% of the total seats, making whites .95% "overrepresented" as measured by total population and .92% "underrepresented" by VAP. Drawing one additional majority-minority district in southwestern Tennessee results in a total of four majority African-American districts in the state Senate, or 12.1% of the total seats. Under such a plan, African-Americans statewide would be 24.02% "underrepresented" as measured by total population and 15.62% "underrepresented" by VAP. The remaining 29 state Senate seats would have white majorities, accounting for 87.9% of the total seats, making whites 4.56% "overrepresented" as measured by total population and 2.62% "overrepresented" by VAP.

In reaching its findings as to the electoral success of African-American candidates, the three-judge court determined that the scope of this review was the entire state. J.S. App. at 20a. The court selected VAP as the numerical basis for determining "the proportionality of black representation," because the term "electorate" appears in subsection

(b) of Section 2. *Id.* Having found violations of Section 2 centered in urban Shelby County and rural west Tennessee as alleged by Appellants, J.S. App. at 3a, the three-judge court ordered the state to draw only one additional majority-minority district to remedy the violations, when two could have been drawn. The court held that the state was not required to adopt a plan with two additional majority-minority districts, because African-Americans would be "slightly" over proportionally represented as measured by VAP with two additional districts. J.S. App. at 31a.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

After a straightforward application of the standards set out in this Court's decision in *Thornburg* v. *Gingles*, the three-judge district court found that the State of Tennessee's 1992 redistricting plan for the state Senate deprived African-Americans of an equal opportunity to participate in the political process and to elect representatives of their choice. This appeal does not raise any question concerning those liability determinations. This appeal relates to the court's erroneous approach to remedying the violations.

This case presents an issue of critical importance to the Voting Rights Act. The three-judge court has improperly used proportional representation as an inflexible cap on the remedy for discriminatory vote dilution that the court itself found, in direct contravention to well-settled law and the legislative history of the Act.

To compound this error, the court confuses the numerical basis used to determine whether effective majority-minority districts can be drawn under *Gingles* with the basis used to determine whether there is fair or proportional minority representation in the state legislative body. As a result, the court failed to order a full and complete remedy for the violations that it found — two additional majority-minority districts — requiring the state to create only one such district.

This error deprives African-Americans in southwestern Tennessee of a majority-minority state Senate district and the *opportunity* to participate equally in the political process and elect representatives of their choice, where the three-judge court found violations of the Voting Rights Act. Failure to correct this error on appeal will leave Appellants irreparably harmed, as discriminatory vote dilution will continue.

I.

The Decision Below Conflicts with the Decisions of this Court and other Federal Courts

In direct conflict with the decisions of this Court and other federal courts, the three-judge district court selected VAP as the numerical basis for determining proportional African-American representation and applied the proportional representation limitation language in subsection (b) of Section 2 as a rigid and inflexible remedy cap.[7] The court erroneously selected VAP as its numerical basis in reliance upon caselaw addressing the inapposite issue of whether effective majority-minority districts can be drawn under *Thornburg* v. *Gingles* and because the word "electorate" appears in subsection (b) of Section 2.

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7. The following language is, hereinafter, referred to as the proportionality disclaimer: "The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. 1973(b).

1. Total Population is the Correct Basis for Determining Representative Fairness.

This Court has held that total population is the correct basis for determining proportional representative fairness. In *Thornburg* v. *Gingles*, this Court implicitly concluded that the basis for determining representative fairness is total population. 478 U.S. at 74 n.35. This Court compared black electoral success in the challenged multi-member districts with total population in discussing whether minorities had achieved proportional representation and whether minorities were barred from further relief under Section 2.[8] 478 U.S. at 104 (O'Connor, J., concurring). Similarly, in *United Jewish Organizations, Inc.* v. *Carey*, 430 U.S. 144, 166 (1977), this Court rejected a voting rights challenge by white voters, noting that "even if voting in the county occurred strictly according to race, whites would not be underrepresented relative to their share of the *population*." (emphasis added). *Accord Beer* v. *United States*, 425 U.S. 130, 137 (1976) (addressing issue of whether minority group has right to be represented in proportion to "number in general population").

Decisions of the lower courts are to the same effect. In *Nash* v. *Blunt*, 797 F. Supp. 1488, 1500 (W.D. Mo. 1992), *aff'd*, 113 S. Ct. 1809 (1993), for example, the court used voting age population to determine effective minority voting districts, but total population as the basis for determining representative fairness. Similarly, in *Jeffers* v. *Clinton*, 730 F. Supp. 196, 198 (E.D. Ark 1989), *appeal dismissed*, 498

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8. *Gingles* involved a challenge to certain multi-member districts, not the entire legislative plan. In determining that blacks in District 23 had achieved "consistent, proportional representation," the Court compared the success of blacks—electing one member of a three member delegation—against the *total* black population in District 23, which was 36%. 478 U.S. at 77.

U.S. 1129 (1991), the court used the "total population of the state of Arkansas" in determining the of level representative fairness for African-Americans.

A review of the legislative history of Section 2 also demonstrates that total population is the correct basis for determining representative fairness. In *Reynolds* v. *Sims*, this Court concluded that population equality was the touchstone of equal protection in redistricting, holding: "The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races." 377 U.S. 533, 568 (1964). When Congress amended Section 2 of the Voting Rights Act in 1982, it expressly noted that:

> The principle that the right to vote is denied or abridged by dilution of voting strength derives from the one person, one vote reapportionment case of *Reynolds* v. *Sims*.

S. Rep. No. 417, 97th Cong., 2d Sess. 19 (1982) (hereinafter Senate Report). Given the fact that Congress derived the vote dilution standards of Section 2 in part from the standards articulated in *Reynolds* v. *Sims*, focusing on total population equality in redistricting, it would make no sense to hold that Congress intended to determine representative fairness in redistricting on a more restricted basis. The Voting Rights Act was designed to protect the rights of an entire class of citizens to participate in and influence the political process, not merely to cast a ballot. Had Congress meant to narrow this scope and protect only voting age population, it surely would have said so.

The Supreme Court has repeatedly held that the Voting Rights Act, including Section 2, far from being given a narrow reading, "should be interpreted in a manner that provides 'the broadest possible scope' in combatting racial discrimination." *Chisom* v. *Roemer*, 111 S. Ct. 2354, 2368 (1991) (quoting *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 567 (1969)). Narrowly defining the basis for determining

representative fairness as either actual voters, registered voters, or voting age population would be contrary to both the legislative history of Section 2(b) and prior decisions of this Court.

2. The Three-Judge Court Erroneously Applied the VAP Standard in the First Prong of *Thornburg* v. *Gingles* to Remedy.

The three-judge court essentially confused the numerical basis used to determine the representative fairness in legislative bodies with the basis used to determine whether effective majority-minority districts can be drawn to meet a plaintiff's threshold burden of proof in a Section 2 action. To meet their threshold burden under the first prong of *Thornburg* v. *Gingles*, plaintiffs must establish that the minority community is sufficiently numerous and geographically compact to constitute a majority in a fairly-drawn single member district. *See Thornburg* v. *Gingles*, 478 U.S. at 50 & n.17. To satisfy this requirement plaintiffs must show that a district can be drawn in which the minority group would constitute a voting age majority. VAP is relevant for the specific purpose of determining the "electoral potential" of a minority community.[9] *Id.* The case relied upon by the three-judge court, *Growe* v. *Emison*, 113 S. Ct. 1075, 1079 (1993) (citing *Romero* v. *Pomona*, 883 F.2d 1418, 1425-26 (9th Cir. 1989)), addresses the first *Thornburg* v. *Gingles* prong, rather than the issues of representative fairness or electoral success. The language of the Section 2 proportionality disclaimer is expressed strictly in terms of population, signaling that a separate determination is made under the Voting Rights Act.

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9. Traditionally, a figure of 50+1% African-American VAP has been used to satisfy the "sufficiently numerous and geographically compact" prong of *Gingles*. *See, e.g.*, *Solomon* v. *Liberty County*, 899 F.2d 1012, 1018 (11th Cir. 1990) (Kravitch, J., concurring), *cert. denied*, 498 U.S. 1023 (1991).

3. The Three-Judge Court Erroneously Relied on the Term "Electorate" in Assessing Proportionality.

The three-judge district court used VAP as the basis for assessing proportional minority representation by relying on the language in Section 2 which provides:

> A violation of subsection (a) of this section is established if, based on the totality of the circumstances, it is shown that. . . members [of a protected minority group] have less opportunity than other members of the *electorate* to participate in the political process and to elect representatives of their choice.

42 U.S.C. § 1973(b) (emphasis added). The district court adopted the word "electorate," rather than population, as its basis for determining representative fairness and establishing a remedial cap. This determination is contrary to the language of Section 2, presents serious definitional problems, and improperly restricts the scope of the Act. "Electorate" is more properly defined as registered voters, actual voters or even the district itself, as opposed to voting age population.[10] Applying such definitions for determining a violation of Section 2 would reduce the protection of minority voting rights in precisely those areas, like the counties in southwestern Tennessee, with the worst records of discrimination in voter registration and voting. *See United State* v. *Beaty*, 288 F.2d 653 (6th Cir. 1961); J.S. App. at 15a-18a. Such a result would be totally at odds with the remedial purposes of the Voting Rights Act, a major purpose of which was to combat the continuing effects of discrimination in registering and

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10. Electorate has been defined as 1: the rank of an elector in the Holy Roman Empire; also, the territory of such elector, 2: all those qualified to vote in an election and 3: a division or district of voters; an electoral district. Webster's New Universal Dictionary (2d ed. 1983).

voting. *South Carolina* v. *Katzenbach*, 383 U.S. 301, 315 (1966).

The arbitrariness of the district court's decision to equate the word "electorate" in Section 2 with voting age population and use it as a numerical basis for measuring proportionality is further illustrated, as noted *supra*, by the one-person, one-vote cases and the legislative history of the 1982 amendment of Section 2. Although the phrase "one-person, one-vote" undeniably refers to voters, it has been consistently interpreted and applied as a requirement that electoral districts have roughly equal population — not equal numbers of registered voters or voting age population. *See, e.g.*, *Reynolds* v. *Sims*, 377 U.S. at 560-61 (1964) ("[t]he fundamental principle of representative government is one of equal representation for equal numbers of people"); *Voinovich* v. *Quilter*, 113 S. Ct. 1149, 1159 (1993). In voting rights cases, "electorate" thus has an expansive meaning that includes both "voters" and "population."[11]

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11. Appellants also contend that, even if a VAP-based proportional representation remedy cap is appropriate, 14.4% in not an accurate enumeration of Tennessee's African-American VAP. The state, Brief of Defendants in Support of Motion to Alter or Amend Judgement in *Langsdon* v. *Milsaps* at 15-16, and the U.S. Census Bureau acknowledge that African-Americans are undercounted by 4.8% nationwide. *See* Samuel Issacharoff & Allan J. Lichtman, *The Census Undercount and Minority Representation: The Constitutional Obligation of the States to Guarantee Equal Representation*, 13 The Review of Litigation 1, 8 (1994). As African-Americans would be only 5.47% "overrepresented" according to census VAP if a full remedy of two additional majority-minority districts were drawn in southwestern Tennessee, the undercount seriously undermines the three-judge court's determination that such a remedy would exceed a VAP based proportional representation remedy cap.

II.

The Three-Judge Court's Ruling that Section 2(b) Imposes a Remedy Cap is an Issue of Fundamental Importance that should be Resolved by this Court

The three-judge district court erred in holding that the state is not required to create additional majority-minority districts if doing so would produce a plan in which African-Americans have the opportunity to elect representatives of their choice in a greater-than-proportional number of state Senate districts. In opting to order only a partial remedy for the wrongs it found centered in rural west Tennessee and urban Shelby County, when a full and fair remedy was available, the three-judge court explicitly rejected Congress' admonition in the Voting Rights Act's legislative history calling for a remedy that:

> completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice.

Senate Report at 31; *see* J.S. App. at 30a. The three-judge court grounded its decision to cap Appellants' remedy on the text of the Act, which disavows any right to proportional representation, and cited a pair of cases, determining that "Congress did not intend to require *maximum* representation." J.S. App. at 30a-31a.

1. The Caselaw and Legislative History Show that Section 2's Proportionality Disclaimer was not Meant to Serve as a Remedy Cap.

The proportionality disclaimer in Section 2(b) was not meant to function as an inflexible limitation on remedy where there has been a judicial finding of vote dilution. An analysis of the caselaw underlying Section 2 makes it apparent that the disclaimer was addressed to liability, rather than remedy. The 1982 amendment of the Voting Rights Act codified the results test of *White* v. *Regester*, 412 U.S. 755, 766 (1973),

incorporating that precedent and related caselaw into the application of Section 2. Senate Report at 2. In *White*, the Court addressed proportionality as an element of the burden of proof at the liability phase of the litigation:

> To sustain [voting rights] claims, it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential. The plaintiffs' burden is to produce evidence to support findings that the political process leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political process and to elect legislators of their choice.

412 U.S. at 766 (citing *Whitcomb* v. *Chavis*, 403 U.S. 124, 149-50 (1971)). A plain reading of *White*, *Whitcomb*, and the legislative history of Section 2, shows that the concern with proportionality was at the liability, rather than the remedy, phase of voting rights litigation. Through the proportionality disclaimer, Congress sought expressly to state that the lack of proportional representation, alone, was insufficient to sustain a finding of liability. Senate Report at 200; *see also Chisom* v. *Roemer*, 111 S. Ct. at 2366 n. 26 (the intent of Congress was to "make clear that the results test does not require the proportional election of minority candidates in any election"). The cases cited by the three-judge court reinforce the applicability of the proportionality analysis only to the liability phase of litigation. *See*, *e.g.*, *Turner* v. *Arkansas*, 784 F. Supp. 553, 577-78 (E.D. Ark. 1991), *aff'd*, 112 S. Ct. 2296 (1992) (court rejected plaintiffs' claim, finding that lack of proportional representation, alone, was not enough to sustain a finding of liability).

A plain reading of the proportionality disclaimer itself also demonstrates its inapplicability at the remedy phase of voting rights litigation. The language of the disclaimer addresses proportional representation as an element of liability.

Further, the disclaimer is put in terms of "right to elect." Appellants have never argued that they have a "right to elect" or "maximize" under the Voting Rights Act. Rather, Appellants claim that Section 2 guarantees an opportunity to participate in the political process on an equal basis. A full remedy, drawing two majority African-American Senate districts, would not guarantee proportional elected representation. Such a full remedy, however, would guarantee African-Americans in Tennessee an equal opportunity to participate in the political process, consistent with the Voting Rights Act.

2. The Three-Judge Court is Bound to Fashion a Remedy Commensurate with the Right Violated.

The proper approach to remedying a Section 2 violation is no different from the proper approach to remedying a violation of any other right guaranteed by federal law. Guided by "well-known principles of equity," *Reynolds* v. *Sims*, 377 U.S. at 585, a court must seek to provide complete relief. *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 770-771 (1976). In a Section 2 case, that means "[t]he court should exercise its traditional equitable powers to fashion the relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice." Senate Report at 31. The "complete and full" remedy standard has been consistently applied by the lower federal courts. *See, e.g., Dillard* v. *Crenshaw County*, 831 F.2d 246, 250 (11th Cir. 1987); *Brown* v. *Board of Comrs.*, 722 F. Supp. 380, 400 (E.D. Tenn. 1989) (citing Senate Report as the standard for "acceptable" relief in Section 2 cases).

Although the three-judge court did not need to address with specificity the remedy for Section 2 violations found in rural west Tennessee and urban Shelby County at the close of

the liability phase in the action, the order requiring only one additional majority African-American state Senate district was insufficient to remedy the violations found. *See*, *e.g.*, *Jeffers* v. *Clinton*, 730 F. Supp. at 217 (court declined to set out number of majority African-American districts that should be drawn). Having found that African-American voters have less opportunity under the 1992 state Senate redistricting plan to participate in the political process and elect representatives of their choice, it was incumbent upon the court to fully remedy the violation found.

3. State Redistricting Principles Dictate a Total Popluation Based Remedy.

The Tennessee Constitution requires that legislative districts be apportioned based upon total population. Tennessee Const. Art. 2 § 4. The state has determined that each legislator should represent an equal number of people, so it is contradictory and unfair for the three-judge court to use another basis in determining the representative fairness and ''proportionality'' of the state's redistricting plan. The use of a different basis could have no other result or purpose than to diminish the opportunities of African-Americans to elect candidates of their choice. Under such a standard, African-American representatives would be required to represent a greater population than white representatives, reducing the voting power of African-Americans in general and diminishing their access to representatives, creating a potential Fourteenth Amendment violation. *See Garza* v. *County of Los Angeles*, 918 F.2d 763, 774-75 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991). Nothing in the Voting Rights Act commands or permits such a result. Having found that Tennessee's 1992 state Senate redistricting plan violates Section 2 of the Voting Rights Act, the three-judge court is bound to remedy the violation. Requiring the state to draw two additional majority-minority districts is consistent with state policy and constitutes both a full and fair remedy for the

discriminatory vote dilution.

The three-judge court's use of VAP proportionality as an inflexible remedy cap critically undermines the protection afforded minorities by Section 2. This Court should reject such an inflexible approach to remedying the violation of discriminatory vote dilution in an area where a myriad of considerations inform rational decisionmaking. Flexibility not rigidity should be the touchstone to the exercise of federal remedial powers. Using VAP, rather than total population, as the basis for determining representative fairness means that African-Americans in Tennessee will continue to be deprived of the representation to which they would otherwise be entitled by virtue of a consistently applied state policy. Such a result would be contrary to the express language of Section 2(b), *Thornburg* v. *Gingles* and its progeny, and state redistricting policy. This error must be addressed on appeal to ensure that judicially-determined vote dilution is eliminated in Tennessee and to prevent the erosion of the remedial powers of the Voting Rights Act.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction in this action and set the case for argument.

Respectfully submitted,

LAUGHLIN MCDONALD*
NEIL BRADLEY
MARY WYCKOFF
American Civil Liberties Union Foundation, Inc.
44 Forsyth St. NW – Suite 202
Atlanta GA 30303
(404) 523-2721

BRUCE KRAMER
Cooperating Attorney
American Civil Liberties Union Foundation of Tennessee, Inc.
BOROD & KRAMER
80 Monroe — 7th Floor
Memphis, TN 38103
(901) 524-0221

RICHARD DINKINS
WILLIAMS AND DINKINS
203 2nd Avenue North
Nashville TN 37201
(615) 244-3988

KEENAN KELLER
DAVIS POLK & WARDWELL
450 Lexington Avenue
New York NY 10017
(212) 450-4933
Attorneys for Appellants

* Counsel of Record

Dated: February 28, 1994

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE

Civil Action No. 92-2407-TUBRO

Judge Merritt *Judge Brown* *Judge Turner*

RURAL WEST TENNESSEE AFRICAN-AMERICAN AFFAIRS COUNCIL, INC., MINNIE BOMMER, JEAN CARNEY, DR. C.T. BOYD, BRENDA WOODS, SHIRLEY KEE, ANNA FAYE MOORE, REV. WILLIAM SMART, and DR. WARREN DICKERSON,

Plaintiffs,

v.

NED MCWHERTER, in his official capacity as Governor of the State of Tennessee, JOHN WILDER, in his official capacity as Lieutenant Governor and Speaker of the Tennessee Senate, JAMES NAIFEH, in his official capacity as Speaker of the Tennessee House of Representatives, WILL BURNS, in his official capacity as Coordinator of Elections, and LENITA MCGRAW, JANET BLACK, JUDY BISHOP, ELLA MAE ESQUE, SPENCE DUPREE, BOBBY WHITE, and LINDA BURNETT, in their official capacities as Registrars of Fayette, Hardeman, Haywood, Lauderdale, Madison, Shelby and Tipton Counties,

Defendants.

[Filed Nov. 4, 1993]

OPINION OF THREE-JUDGE COURT

Before: MERRITT, *Chief Circuit Judge*; BROWN, *Senior Circuit Judge*; TURNER, *District Judge*.

This is a civil rights case brought under § 2 of the Voting Rights Act, 42 U.S.C. § 1973,[1] and several constitutional provisions. The action challenges Tennessee's 1992 apportionment of its 33 state Senate districts.[2] Tennessee's voting age population is 14.4% black, but in only three of the districts (9.1%) do blacks have a reasonable chance to elect a black-preferred candidate as a state senator. We do not reach the constitutional questions because we find that the plan violates § 2 by affording black voters in west Tennessee less opportunity than other members of the electorate to elect representatives of their choice. The legislature must revise its

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1. The Act provides

> (a) No voting qualification . . . shall be imposed . . . in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . (b) A violation of subsection (a) of this section is established if, *based on the totality of circumstances*, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section *in that its members have less opportunity than other members of the electorate* to participate in the political process and *to elect representatives of their choice.* The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973 (emphasis added).

2. We do not concern ourselves in this case with the Rural West Tennessee African-American Affairs Council's Voting Rights Act challenge to the reapportionment of [the Tennessee House of Representatives] because our decision in *Langsdon* v. *Milsaps*, 836 F. Supp. 447, 1993 U.S. Dist. LEXIS 15625 (1993) declared the House reapportionment bill unconstitutional under the Equal Protection Clause of the Fourteenth Amendment, thereby rendering the House reapportionment issue in this case moot.

apportionment of the state senate to provide four majority black districts in order to comply with § 2.

I.

The Tennessee General Assembly consists of a thirty-three member Senate and a ninety-nine member House of Representatives. The state Senate is elected from single-member districts of roughly equal population. Under the 1992 reapportionment plan, three of the thirty-three Senate districts contain a majority-black population. Two of the three majority-black Senate districts are in Shelby County in southwest Tennessee, the third is in the middle of the state in Nashville, Davidson County.

Plaintiffs challenge the effect of the 1992 plan on the voting strength of blacks living in west Tennessee. The evidence presented at trial relates primarily to seven west Tennessee counties: Shelby County (which includes the city of Memphis), and six predominantly rural counties, Tipton, Lauderdale, Haywood, Madison, Fayette, and Hardeman. Plaintiffs contend that black voters in Shelby County are unnecessarily "packed" into the two majority-black districts and that three majority-black districts could easily be created in Shelby County. They also allege that by splitting concentrations of black population in the rural counties into different Senate districts, the 1992 plan dilutes black voting strength.

Under the 1992 plan, there are five Senate districts contained wholly within Shelby County, Districts 28, 29, 30, 31, and 33. Senate District 32 contains part of Shelby County and all of Lauderdale and Tipton Counties. Plaintiffs contend that the two majority-black districts, districts 29 and 33, are "packed" with an excessive number of black voters. District 29 has an 83% black voting-age population, and District 33 has a 69% black voting-age population. Districts 28 and 30

have black voting-age populations of 31% and 33%, respectively. Plaintiffs have shown that it is possible to redraw these districts so that there are three majority-black Senate districts in Shelby County instead of two. These proposed districts would have black voting-age populations of 60.9%, 60.9%, and 60.0%

Under the 1992 plan, the six rural counties at issue in this case form parts of three Senate districts, District 26, 27, and 32. Plaintiffs contend that the present configuration of these districts unnecessarily fragments concentrations of black population. Districts 26 and 27 both have black voting-age populations of 21%, and District 32, which contains part of Shelby County, has a black voting-age population of 17%. Plaintiffs have shown that by including part of Shelby County it is possible to draw a district in rural west Tennessee with a black voting-age population of more than 55%. Plaintiffs first proposed a rural Senate district which would split the six rural counties and Shelby County. Plaintiffs have shown, however, that it is possible to draw a Senate district with a greater than 55% black voting-age population by splitting only Shelby and Madison counties and by including all of rural Haywood, Fayette, and Hardeman counties.[3]

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3. The latter plan presented by the plaintiffs was not proved during trial, but was offered by the plaintiffs in their Motion to Supplement the Record With Alternative Rural West Tennessee Senate District. Since defendants had no opportunity to examine the demographer who prepared the plan, we do not know the defendants' position relative to this plan. Moreover, it appears that this plan splits the city of Jackson in Madison County.

II.

Plaintiffs allege that by failing to create three majority-black Senate districts in Shelby County and one majority-black Senate district in rural west Tennessee, the State has violated § 2 of the Voting Rights Act by diluting the voting strength of black voters in Tennessee.

The Voting Rights Act was passed in 1965, and was amended in 1982. The purpose of the 1982 amendment was to "make clear that plaintiffs need not prove a discriminatory purpose in order to establish a violation." *Chisom* v. *Roemer*, 115 L. Ed. 2d 348, 111 S. Ct. 2354, 2363 n.21 (1991) (quoting S. Rep. No. 417, 97th Cong., 2d Sess. 2, *reprinted in* 1982 U.S.C.C.A.N. 177 [hereinafter Senate Report]). The statute thus sets out a "results test." *Thornburg* v. *Gingles*, 478 U.S. 30, 44, n.8 92 L. Ed. 2d 25, 106 S. Ct. 2752 (1986). A voting procedure violates the Act in this case if it has the "result" under the "totality of the circumstances" of affording black voters less opportunity than white voters "to elect representatives of their choice." 42 U.S.C. § 1973(b).

The Senate Judiciary Report on the 1982 amendment sets out some of the relevant factors to be considered under the totality of the circumstances.[4] The Supreme Court first

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4. These factors include:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process:

2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

addressed the 1982 amendment in *Thornburg* v. *Gingles*, 478 U.S. 30, 92 L. Ed. 2d 25, 106 S. Ct. 2752 (1986). In *Gingles*, the Court explained the statutory "totality of the circumstances" test and set out the three "necessary preconditions" of a successful § 2 claim, only the last of which is in dispute in this case:

> 1. The plaintiffs must demonstrate that the protected group is sufficiently large and geographically compact that it could constitute an effective majority in a single-member district.

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4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:

whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.

whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Senate Report at 206-07.

The list is not meant to be exclusive, and there is no requirement that any particular number of factors be established *Armour* v. *Ohio*, 775 F. Supp. 1044, 1050 (N.D. Ohio 1991).

2. The plaintiffs must show that the protected group is politically cohesive.

3. The plaintiffs must show that the majority votes sufficiently as a bloc to enable it usually to defeat the protected group's preferred candidate.

Id. at 50-51. Although *Gingles* involved a challenge to multimember districts, the three *Gingles* elements of a § 2 cause of action apply to challenges to single-member systems as well. *Growe* v. *Emison*, 122 L. Ed. 2d 388, 507 U.S. , 113 S. Ct. 1075, 1084 (1993); *Voinovich* v. *Quilter*, 122 L. Ed. 2d 500, 113 S. Ct. 1149, 1157 (1993). Once the elements have been established, plaintiffs must still show that under the totality of the circumstances a violation has occurred. *See Jeffers* v. *Clinton*, 730 F. Supp. 196, 209 (E.D. Ark. 1989).

Plaintiffs, as noted, have submitted two different districting plans which would provide two more Senate districts in west Tennessee with black voting-age populations of greater than 55%. Either of plaintiffs' suggestions satisfies the first element of *Gingles*. The second *Gingles* precondition is that the minority community be politically cohesive. *Gingles*, 478 U.S. at 51. This is a question of whether black voters in west Tennessee share a community of interests and tend to vote differently from the majority white population. The parties have stipulated that the African-American communities of rural southwest Tennessee and Shelby County are politically cohesive.

The main dispute in this case concerns the third *Gingles* factor: whether the white majority votes sufficiently as a bloc to enable it usually to defeat the black minority's preferred candidate. The focus of the dispute is the definition of "preferred candidate." Plaintiffs contend that when there is no black candidate in a race there is no way to be sure that the candidate who receives the most black votes is the "true"

candidate of choice and not simply the "lesser of two evils." They therefore rely solely upon West Tennessee state legislative elections in which there is at least one black and one white candidate.[5] The State relies instead upon all West Tennessee state legislative elections since 1986 for which election data is available, regardless of whether there is a black candidate in the race. The State concedes that "black-white" elections are more relevant to our inquiry than are "white-white" elections, but proposes to control for the difference by weighing elections based upon black voter turnout. It argues that if blacks do not have a strong preference in a white-white election, black voter turnout should be expected to drop and the election should be given correspondingly less weight.

Under plaintiffs' analysis it is clear that white bloc voting usually works to defeat the black preferred candidate in white majority districts. Plaintiffs' expert, Stephen Cole, analyzed seven state legislative elections in rural west Tennessee and eight in Shelby County. In six of the seven rural county elections there was voter polarization based upon race, and in five of the elections the level of polarization was overwhelming.

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5. Both parties employed "ecological regression analysis" to estimate the actual voting behavior of black and white voters. This statistical technique is standard in the field and has been accepted by numerous courts including the Supreme Court in *Gingles, 478 U.S. at 53-61. Both parties also examined elections other than those for the state legislature. Because the results in these* "exogenous" elections are consistent with the results in the state legislative elections, and because state legislative elections are the most relevant to our inquiry, we rely solely upon the evidence of voting behavior in the state legislative contests. *C.f. Brown* v. *Board of Comm'rs of Chattanooga*, 722 F.Supp. 380, 390-91 (E.D. Tenn. 1989) (relying on the results of previous city elections as most relevant in a Voting Rights Act challenge to the city electoral system).

White support of black candidates was particularly low, with only one black candidate receiving more than 10% of the white vote. No black candidate won any of the state legislative elections held in rural west Tennessee.

Black candidates in Shelby County were more successful, winning four of the eight recent black-white contests for state legislative office. Blacks were able to win, however, only in majority-black districts, and in only one election did a black candidate win even a bare majority of the white vote. The overall level of racially polarized voting in Shelby County is comparable to that in the rural counties. To give some idea of the level of white bloc voting in Shelby County is comparable to that in the rural counties. To give some idea of the level of white bloc voting in west Tennessee it is interesting to compare the fifteen black-white elections in this case to the thirty-seven black-white elections in this case to the thirty-seven black-white elections considered in *Gingles*. In the North Carolina state legislative races analyzed in *Gingles*, black candidates received an average of 31.62% of the white vote. In the fifteen elections analyzed by the plaintiffs in this case, black candidates received an average of only 9.07% of the white vote. Based solely upon the black-white state legislative elections in west Tennessee, then we find a high level of white bloc voting which usually enables the majority to defeat the black community's candidate of choice.

The State's analysis of black voter turnout does not significantly affect this conclusion. The State's expert witnesses, Michael M. Gant and William Lyons, proposed to measure the importance of white-white elections to black voters by comparing black voter turnout in white-white elections to turnout in black-white elections. They looked at all elections in which black voters and white voters preferred different candidates and in which the voting-age population was between 25% and 50% black. The State's rationale for

limiting the analysis to elections in districts with a 25% to 50% black voting-age population was that (1) in districts with a voting-age population less than 25% black, the chance of a black candidate succeeding is so low that black turnout may suffer for reasons unrelated to the race of the candidates; and (2) in districts with a voting-age population greater than 50% black the black-preferred candidate is virtually assured victory. In the nineteen elections which met the State's criteria, black turnout was 24% in white-white elections and 28% in black-white elections. The State therefore concludes that black voters are almost as interested in white-white elections as in black-white elections, and so white-white elections should be given almost as much weight under the third *Gingles* factor as black-white elections.

While we agree with the State that black voter turnout is relevant to the question whether the black-preferred candidate in a white-white election is the "true" candidate of choice of the black community, we do not think it is the only, or even most important, consideration. First, voter turnout in state legislative elections is influenced primarily by the nature of other elections taking place at the same time and secondarily by the weather. *See Rainbow Coalition of Oklahoma* v. *Oklahoma State Election Board*, 844 F.2d 740, 742 (10th Cir. 1988) (stating that it is "undisputed" that in Oklahoma, where gubernatorial and presidential elections alternate every two years, voter turnout is consistently higher during presidential elections); Burnham, *The Turnout Problem*, in Elections American Style 97, 113-14 (A.J. Reichley ed. 1987) (noting that voter turnout increases during presidential election years); Briffault, *Our Localism: Part II— Localism and Legal Theory*, 90 Colum. L. Rev. 346, 397-98 (1990) (same): Sam Howe Verhovek, *New York Democrats' Hopes Tied to Clinton Coattail Effect*, N.Y. Times, Nov. 3, 1992, at A1 (calling weather conditions "[o]ne of the classic vagaries behind

voting patterns''). Second, to the extent voter turnout is affected by local elections, black voter turnout measures only the general level of interest in the election outcome, not necessarily the absolute level of support in the black community for the black-preferred candidate. For instance, in some white-white elections, blacks may turn out in high numbers to defeat a particularly disfavored candidate. We therefore reject the State's contention that white-white elections are almost as relevant to our inquiry as are black-white elections.

Other district courts in the Sixth Circuit have also taken the position that black-white elections should be given more weight then white-white elections. In *Buchanan* v. *City of Jackson*, 683 F. Supp. 1515, 1529 (W.D. Tenn. 1988), the court held that ''the court may consider all elections in determining whether members of a minority have less opportunity than other members of the electorate to elect representatives of their choice . . . That is not to say, however, that all elections must be given equal weight.'' The court concluded that ''elections in which there was a black candidate are more probative.'' *Id.* at 1531. *See also Mallory* v. *Eyrich*, 707 F. Supp. 947, 952 (S.D. Ohio 1989). Although the plurality opinion in *Gingles* states that ''it is the status of the candidate as the chosen representative of a particular racial group, not the race of the candidate, that is important,'' 478 U.S. at 68, the *Gingles* Court upheld a decision based solely upon an analysis of black-white elections. *See id.* at 80-82; *see also, Citizens for a Better Gretna* v. *City of Gretna*, 834 F.2d 496, 503-04 (5th Cir. 1988), *cert. denied*, 492 U.S. 905, 109 S. Ct. 3213, 106 L. Ed. 2d 564 (1989) (noting that no Justice in *Gingles* considered ''evidence of elections in which only whites were candidates''); *Campos* v. *City of Baytown*, 840 F.2d 1240, 1245 (5th Cir. 1988) (''*Gingles* itself looked only to elections where Black candidates were running.'') The

Gingles Court also stated that in determining the appropriate number of elections to study when analyzing racially polarized voting, "one important circumstance is the number of elections in which the minority group has sponsored candidates." *Gingles*, 478 U.S. at 57 n.25.

The weight to be given to white-white elections is best determined on a case-by-case basis. *See City of Jackson*, 683 F. Supp. at 1531 (relying upon "elections analyzed in this case and the circumstances surrounding those elections" to determine that races involving black candidates were more probative). The facts of this case persuade us that we should rely primarily upon the black-white elections. The evidence showed that one reason many elections did not involve a black candidate is that black candidates are discouraged from running in majority-white districts. Several plaintiffs, members of the Rural West Tennessee African-American Affairs Committee and black community leaders, testified that they have tried to recruit qualified blacks to run for elective office and found it difficult. This testimony was corroborated by the findings of one of plaintiffs' expert witnesses, Richard Couto. One reason blacks are discouraged from running is that they often see a black candidacy in a majority-white district as a futile gesture. There is a perception in the black community that black candidates cannot expect to receive much white support in the form of votes or fundraising.

Historical discrimination against blacks in west Tennessee has also contributed to the perceived futility of black candidacies in majority-white districts. Plaintiffs presented proof that blacks in west Tennessee have about half the per capita income of whites and three times the level of poverty. Lower economic status inhibits the ability of potential black candidates to raise funds in the black community. Historical black political disenfranchisement also limits potential black

electoral success. Perhaps most important of all, because black candidates have not been elected in the past, they are not now in a position to enjoy the benefits of incumbency and political sponsorship which come with being part of the political mainstream. It would not make sense to allow data from white-white elections in majority-white districts, in which potential black candidates viewed black candidates as futile, to overcome evidence of white bloc voting in black-white elections in districts in which black candidates felt they stood a fighting chance.

We are inclined to give less weight to white-white elections in which black and white voters preferred the same candidate because many of those contests were landslides in which a strong incumbent faced only token opposition. *Gingles* recognizes the legitimacy of such considerations: "the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it — in the absence of *special circumstances*, such as the minority candidate running unopposed, . . . usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51 (emphasis added, citation omitted). "Special circumstances include" the absence of an opponent, *incumbency*, or the utilization of bullet voting." *Id.* at 57 (emphasis added). Of the twenty-seven non-polarized elections analyzed by the State, the average margin of victory of the winning candidate was 41.23%. In fourteen of the elections, over half, the winning candidate received more than 70% of the total vote. These statistics indicate to this Court that black voters and white voters often prefer the same candidate because there is only one viable candidate.

We also are unimpressed by the State's demonstration that, of the thirty-two state legislative contests in which voting was racially polarized, the black-preferred candidate won fourteen, almost half. The character of the elections in which black-preferred candidates defeat white-preferred candidates

is very different from those in which white-preferred candidates defeat black-preferred candidates. In white-white elections in which black-preferred candidates prevail against white voter opposition, the black vote acts as a decisive swing vote in elections over which the white community is closely split. We have no evidence whether any candidates in white-white elections were sponsored by the black community. *See also, Westwago Citizens* v. *City of Westwago*, 946 F.2d 1109, 1119-20 n.15 (5th Cir. 1991) (concluding that black support for white candidates in an all white field tells little about white bloc voting). Like the court in *Jeffers*, we recognize that the power to influence close elections between white candidates is an important aspect of political power, but the principle seems to be that in majority-white districts, "candidates favored by blacks can win, but only if the candidates are white." *Jeffers* v. *Clinton*, 730 F. Supp. 196, 209 (E.D. Ark. 1989) (quoting *Smith* v. *Clinton*, 687 F. Supp. 1310, 1318 (E.D. Ark. 1988)). Racially polarized black-white elections are of a different character. In these elections the black-preferred candidate receives strong black support, 86.30% on the average, but this vote is overwhelmed by white bloc voting averaging more than 90%.

Based upon all of the evidence we find that in Tennessee black-white elections are more probative of racial bloc voting than are white-white elections, and that the black-white elections indicate white bloc voting which usually enables the majority to defeat the black community's candidate of choice. All three of the *Gingles* preconditions have therefore been met. We next move to a consideration of the "totality of the circumstances."

III.

Section 2 of the Voting Rights Act requires us to examine the "totality of the circumstances" to determine whether the challenged electoral practice, the 1992 redistricting plan, gives west Tennessee black voters "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." We begin with the list of factors set out in the Senate Report on the 1982 amendment. *See supra*, note 3. We have already addressed the second listed Senate factor, racially polarized voting, and have found strong evidence of polarization, especially in black-white elections. Under the third Senate factor (leaving aside the challenged redistricting plan) we find no evidence of discriminatory voting practices or procedures — such as "unusually large election districts, majority vote requirements, anti-single shot provisions" — in recent state legislative elections. There is also no evidence of a discriminatory slating process, the fourth Senate factor. Candidates for state legislative offices are selected through an open primary system.

We now turn to the Senate factors that warrant greater attention.

A. History of Official Discrimination in Voting.

There is no doubt that Tennessee has a long history of official racial discrimination in voting. Although the worst discrimination is in the past, effects of past discrimination are still apparent and there remains some evidence of official discrimination in the last 15 years.

The history of official discrimination against blacks in Tennessee begins, of course, with the officially sanctioned institution of slavery prior to the Civil War. Despite the existence of slavery, free black men could and did vote in

Tennessee until 1834, when the Tennessee Constitution was changed to deny the vote to all blacks. In 1867, during Reconstruction, suffrage was extended once again to black males, and black candidates enjoyed some electoral success. With the end of Reconstruction, however, and the beginning of the Jim Crow era, black citizens were once again effectively disenfranchised. In 1889 and 1890 the state legislature passed voting regulations requiring voter registration; separate ballot boxes for local, state and national elections; single, non-partisan ballots; and a poll tax. These laws had the primary purpose and effect of reducing black political participation.

More recently, the political gains by black citizens during the civil rights movement of the 1950's and 60's were accompanied by increased official discrimination in voting. Government officials manipulated voter registration requirements to discourage black voters, and supported or initiated physical and economic intimidation of those blacks who did manage to register. The strongest example of economic intimidation was the eviction of more than 400 black sharecropping families, most of them in Fayette County, after the 1960 election. These evictions were made possible by registrars who would inform sheriffs of the names of blacks who had registered to vote; the sheriffs would then inform white landowners who would evict black tenants who had registered. These mass evictions led to the formation of two "tent cities" for displaced sharecroppers, one in Fayette County and one in Haywood County. The tent cities became national symbols of the struggle of west Tennessee blacks for equal access to the polls.

Although over official discrimination against black voters has declined significantly since the 1960's, at least one federal court has found evidence of intentional discrimination against black candidates and voters in west Tennessee. In

Taylor v. *Haywood County*, 544 F. Supp. 1122 (W.D. Tenn. 1982), the district court enjoined Haywood County from changing its Board of Highway Commissioners election system from district elections to a countywide at-large election. The court found that the change in the number of districts from 10 to 9, which necessitated the change to an at-large election scheme, was "a result of the purposeful intention to dilute black voting strength in Haywood County, Tennessee." *Id.* at 1131. In Hardeman County in 1983 a lawsuit was filed against the City of Bolivar challenging an amendment to the City Charter providing for a mayoral runoff election if no mayoral candidate received a majority of the votes. *Bills* v. *Alexander*, Civ. Act. No. 83-1220 (W.D. Tenn.). The plaintiffs alleged that the City had amended its Charter in response to the success of two black candidates for mayor in 1981. The district court approved a class action settlement setting up a new "system which will ensure the opportunity of black citizens of Bolivar to meaningfully participate in the political process." These cases challenging newly adopted election systems indicate to the court that official discrimination against blacks in voting is not entirely a thing of the past in west Tennessee.

The State acknowledges Tennessee's history of officially sanctioned racial discrimination in voting and the judicial findings of discriminatory practices in local and county elections. The State argues, however, that these facts are not particularly relevant to present-day state legislative elections. We reject this conclusion for two reasons. First, past discrimination, especially that which took place during the civil rights movement, affects present-day politics. It has had a psychological effect upon black citizens who lived through it, creating in some a lingering sense of disillusionment, frustration, and mistrust. That government officials acted to prevent blacks from fully participating in the electoral process in the

1950s and 60s also means that today there are few entrenched and powerful black elected officials from that era. There is no tradition of black electoral success. Second, city and county elective offices are often stepping stones to seats in the General Assembly. Success in these elections can provide experience, credibility, and a political powerbase to potential candidates for the state legislature.

There is no evidence that the defendants, Governor McWherter, Lieutenant-Governor Wilder, Speaker Naifeh, State Election Coordinator Burns, or the county Registrars-at-large, have engaged in any intentional discrimination against black voters. In fact, the testimony of several of the defendants demonstrated sensitivity to the needs of black voters. Nevertheless, we find that in west Tennessee there is a history of official discrimination against blacks in voting which has present-day effects, and that official discrimination in voting is not entirely in the past. Official discrimination, past and present, can increase the effect of vote-diluting district lines.

B. Effects of Discrimination in Such Areas as Education, Employment and Health.

In west Tennessee, black citizens are more likely than white citizens to live in poverty, to be unemployed, and to live in substandard housing. Black citizens are less likely to have completed high school, to own their own homes, to have access to a car, or to have telephones in their homes. As the Senate Report recognizes educational and economic disadvantages can translate into political disadvantage.

C. Racial Appeals in Campaigns.

Plaintiffs presented little evidence of overt racial appeals in campaigns. Their expert witness, Richard Couto, concluded that "racial harangues are unnecessary when there is white hegemony." Plaintiffs placed more emphasis upon the reluctance of white citizens to publicly support black candidacies because of fear of retaliation. There was credible testimony that white supporters of black candidates are often unwilling to display bumper-stickers or yard signs or to otherwise publicly announce their support. Overall, though, the evidence does not support a conclusion that white candidates for elective office in west Tennessee have overtly acted to make race a campaign issue.

D. Electoral Success of Black Candidates.

Section 2 of the Voting Rights Act states that "the extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered" under the "totality of the circumstances." 42 U.S.C. § 1973(b). The Senate Report also lists minority electoral success as a "relevant factor." Senate Report at 29. The statute states further that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." Nevertheless, based upon the evidence presented at trial, we find that the lack of black electoral success in Tennessee is a factor which weighs in favor of a finding of vote dilution.

The State argues that we should confine our analysis of black electoral success to the region of the state at issue, west Tennessee. We agree instead with the plaintiffs' position that the proper scope of our review is the entire state. Although plaintiffs have challenged only the effect of the 1992 redistricting plan upon west Tennessee, what is really at issue is the entire plan. This conclusion is mandated by the language

of the statute itself: "The extent to which members of a protected class have been elected to office in the *State or political subdivision* is one circumstance which may be considered." 42 U.S.C. § 1973(b) (emphasis added).

The statutory authority to consider minority electoral success pertains to the issue of whether the minority within the applicable jurisdiction, in this case the state, suffers from vote dilution. If black electoral success statewide was sufficient to elect more black candidates percentage-wise than their population in the state, it would be difficult, if not impossible, to conclude that the district lines resulted in minority vote dilution in violation of § 2.

We agree with the State, however, that the statute uses the word "electorate" and that we should measure the proportionality of black representation on the basis of black voting age population (the "electorate") rather than total black population. Blacks represent a higher percentage of the total population than of the voting-age population. The plaintiffs urge that the language of the 1982 amendment to the Act — "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion *in the population," id.* (emphasis added) — supports a conclusion that total population should be used. Plaintiff's also point to the statement in the Senate Report that "[t]he principle that the right to vote is denied of abridged by dilution of voting strength derives from the one person, one vote reapportionment case of *Reynolds* v. *Sims*." Senate Report at 19. *Reynolds* noted that "one person" does not mean "one voter," it means one member of the population. *Reynolds* v. *Sims*, 377 U.S. 533, 60-61, 12 L. Ed. 2d 506, 84 S. Ct. 1362 (1964). *Reynolds*, however, is concerned with ensuring that each district incorporates the same number of people so that the voting strength of an individual does not vary by virtue of the location of his or her residence. The language quoted from *Reynolds* is not related to the redrawing of district lines

on the basis of demographic factors and thus is not relevant in this case. *See Beer* v. *United States*, 425, U.S. 130, 142, n.14 (stating that "the many cases . . . involving the Fourteenth Amendment's one man, one vote standard are not relevant in a case involving redistricting"). The goal of § 2 of the Act is to protect the voting strength of minority groups, which is more accurately reflected by voting-age population than by total population. The Supreme Court has noted the prevalence of this standard with approval. *See, e.g., Growe* v. *Emison*, 122 L. Ed. 2d 388, 507 U.S. , 113 S. Ct. 1075, 1079; U.S. Lexis 1780 (1993) at 25 (noting that "to establish whether a § 2 violation has occurred . . . courts have looked to, not the district's total minority population, but the district's minority population of voting age" and citing *Romero* v. *Pomona*, 883 F.2d 1418, 1425-1426, and n.13 (9th Cir. 1989) (citing cases) and *Gingles* 478 U.S. at 48, 50).

The voting-age population in Tennessee is 14.4% black. The General Assembly's 1992 reapportionment plan has the same number of majority-black districts as did the previous plan, three out of thirty-three. It has been demonstrated that black candidates cannot expect to succeed in majority-white districts. To our knowledge, no black from a majority-white district has won a seat in the state Senate this century. Under the new plan, then, blacks can expect to hold 9.1% of the Senate seats, the same percentage blacks now hold. Four majority-black districts would be 12.1% of the Senate districts, slightly below the voting-age population of 14.4%; five of thirty-three districts would be 15.2%, slightly above the black voting-age population. We recognize that the level of black electoral success is merely a factor to be considered, and that blacks are not guaranteed proportional representation by § 2. With this caveat in mind, we find that the level of black electoral success in the state Senate indicates that the Senate reapportionment plan will result in minority vote dilution.

E. Responsiveness of Elected Officials.

Plaintiffs have disavowed any attempt to prove that state elected officials are unresponsive to their black constituents. Plaintiffs filed a motion in limine to preclude the defendants from offering testimony on the responsiveness of elected officials. We declined to forbid all such testimony, holding that responsiveness is relevant to intent under plaintiffs' constitutional claims, and relevant to the § 2 claim under the "totality of the circumstances." We did, however, limit evidence to the responsiveness of the General Assembly as a whole, rather than the responsiveness of individual legislators, because the actions of particular officeholders are not at issue.

The State presented evidence that the General Assembly is responsive to the black community in west Tennessee. White legislators with large black constituencies campaign hard in the black community, are often endorsed by black organizations, and often receive strong black support at election time. Lieutenant-Governor Wilder,[6] state Senator from District 26 and Speaker of the Senate, provided a long list of measures passed by the General Assembly aimed primarily at helping the black community. On the other hand, some of the plaintiffs, citing specific examples of neglect, testified they did not feel that the General Assembly is as responsive to black citizens as to white citizens.

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6. Because Tennessee law provides that the Speaker of the Senate shall succeed the Governor, the Speaker of the Senate is referred to as the Lieutenant-Governor even though he has no duties in the State's executive branch.

There is some merit to both sides of this dispute. In the political process it is impossible to please everyone: from time to time interest groups and constituencies will feel slighted despite what legislators feel are their best efforts to be fair to everyone. *See Jeffers*, 730 F. Supp. at 213 (''There is bound to be some public dissatisfaction, among blacks as well as whites, with almost any office holder[.]''). Such differences of opinion are difficult for this Court to resolve. The House Report on the 1982 amendment recognized this problem when it praised the amendment for avoiding ''highly subjective factors such [as] responsiveness of elected officials to the minority community.'' Senate Report at 27, 24 (quoting H. Rep. No. 97-227, 97th Cong., 1st Sess., at 30). Although we believe that under the totality of the circumstances the legislature's responsiveness to the black community may be considered, the evidence before us is equivocal. We do not, therefore, place much weight upon this factor.

F. State Policy Underlying Redistricting Plan.

An ''additional factor[] that in some cases has had probative value as part of plaintiffs' evidence to establish a violation'' is ''whether the policy underlying the state or political subdivision's use of [the challenged voting procedure] is tenuous.'' Senate Report at 29. The primary policy asserted by the state in retaining the present reapportionment plan is the state's constitutional policy of preserving the integrity of county lines. The Tennessee Constitution, Article II, Section 6, provides that, in apportioning Senate districts, ''no county shall be divided in forming such a district.''[7] A federal

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7. The Tennessee Supreme Court has recognized that this prohibition must yield to the requirements of § 2 if there is a conflict. *State ex rel. Lockert* v. *Crowell*, 631 S.W.2d 702, 708-09 (Tenn. 1982); *State ex rel. Lockert* v. *Crowell*, 656 S.W.2d 836, 843 (Tenn. 1983).

district court has already recognized that Tennessee's policy of preserving county lines is far from "tenuous." In *Murray* v. *Crowell*, No. 84-0566 (M.D. Tenn. 1985), the court found a number of justifications for the policy: (1) it inhibits political gerrymandering; (2) it reduces voter confusion; (3) it makes representatives more accountable to citizens of a county as a group; (4) it reduces the costs of holding elections and running for office; (5) it provides bright-line clarity to reapportionment law; (6) it enhances the representation of county governments in the state legislature; and (7) it encourages voter participation.

The Supreme Court has indicated that, not only must a court determine that the state's interest in a challenged voting procedure is not "tenuous," it must also consider whether the state's interest is compelling. In *Houston Lawyers' Ass'n* v. *Attorney General of Texas*, 115 L. Ed. 2d 379, 111 S. Ct. 2376 (1991), the Court stated that "the State's interest in maintaining an electoral system . . . is a legitimate factor to be considered among the 'totality of the circumstances' in determining whether a § 2 violation has occurred." *Id.* at 2381. Since *Houston Lawyers*, a number of district courts have examined the state's interest in its electoral system under the totality of the circumstances. *See Nipper* v. *Chiles*, 795 F. Supp. 1525, 1532 (M.D. Fla. 1992); *Magnolia Bar Ass'n.* v. *Lee*, 793 F. Supp. 1386, 1412 (S.D. Miss. 1992); *Southern Christian Leadership Conf.* v. *Evans*, 785 F. Supp. 1469, 1478-80 (M.D. Ala. 1992); *Clark* v. *Reomer*, 777 F. Supp. 471, 479 (M.D.La. 1991).

There are some practical problems with weighing state interests under the totality of the circumstances test. First, § 2 is concerned with "results," specifically the ability of minority groups to elect representatives of their choice. *See Gingles*, 478 U.S. at 44 and n.8 (stating that the Senate Report makes clear that § 2 imposes a "results test"). Consideration

of a state's interests in adopting a challenged electoral system is more appropriate under the "intent" test rejected by Congress. *Id.* (citing Senate Report). As the Fifth Circuit observed:

> Because the state interests would not be a signal of dilution like the other Section 2 factors (including the tenuousness of the state interests), a court analyzing a Section 2 claim under the proposed balancing framework would no longer ask only whether, under the totality of the circumstances, there is an unequal opportunity to participate in the political process. The court would also ask whether, in light of the state interests, the unequal opportunity to participate is sufficiently unequal to support a finding of liability under Section 2. In other words, the state interests would have to be weighed *against* proven vote dilution. The problem with such a framework, from a district court's perspective, is the lack of standards for such an approach.

League of United Latin American Citizens v. *Clements*, 986 F.2d 728, 763 (5th Cir. 1993), on remand from *Houston Lawyers'*, 115 L. Ed. 2d 379, 111 S. Ct. 2376 (citations omitted).

The second practical problem is that the state's interests in an electoral scheme are only relevant to the extent that those interests are compromised by a possible § 2 remedy. *See id.* at 763-64. When potential remedies do not impinge on the state's interests those interests need not be considered. We have before us only two of the numerous possible remedies, both of which were presented by the plaintiffs. The first plan was presented primarily to demonstrate that the first *Gingles* precondition can be met. The second plan was submitted in response to concerns expressed by the court and the State that

plaintiffs' plan ignored "traditional districting principles." *Shaw* v. *Reno*, U.S. ; 113 S. Ct. 2816, 2824, 125 L. Ed. 2d 511 (1993). Specifically, one of the proposed majority-black districts split six counties. Plaintiffs' second plan demonstrated that a second district could be created by splitting only Shelby and Madison Counties. Under the current plan, some counties are split in forming Senate districts, but no district splits more than one country.

G. "Influence" Districts vs. Majority-Minority Districts

The State mounts a strong additional argument under § 2 of the Voting Rights Act that, although the creation of one or more majority black districts in west Tennessee would likely increase the number of black state senators, such a change may well reduce the overall influence of black voters in the State Senate. The State's argument is that it is better under § 2 for minority voters to have their influence spread widely than to be able to control a few districts.

Senator Steve Cohen, a white state senator from Memphis whose district would become majority black under the plaintiffs' redistricting proposal, testified that the actual influence of black voters would be reduced because the black voters in one or more adjacent majority white districts would have to be removed and placed in his district, thereby reducing the broader influence of black voters in several districts. He gave as an example of the reduced influence the legislative proposal to make the birthday of Martin Luther King a state holiday, a bill which passed in the State Senate by only one vote (17 to 16). Senator Cohen voted for the bill, and another white Senator in an adjacent Shelby County district also voted for the bill. The thrust of Senator Cohen's testimony was that by removing black votes from the adjacent majority white district in order to make a black majority district, at least one more conservative white Senator would probably be

elected, a Senator who would be uninfluenced by black voters and would have been inclined to vote against the King birthday bill a symbolic measure strongly favored by black voters but opposed by many white voters in west Tennessee.

Conceptually it may be true, at least in some instances, that black influence in the legislative process on a statewide basis could be reduced by the creation of one or more additional majority black districts. Black voters may join like-minded white voters to elect a white representative favorable to black interests. By spreading the black vote out in several districts, the influence of black voters, but not their visible black representation, may be enhanced.

The § 2 legal question which underlies this debate is this: When a choice is between two or more black "influence" districts, most likely represented by whites, versus one majority black district represented by a black, what does § 2 require in geographical areas of racially polarized block voting with a history of prior racial discrimination? Although this question of interpretation is latent in several voting rights cases, the courts have not expressly decided it. In *Jeffers* v. *Clinton*, 730 F. Supp. 196 (E.D. Ark. 1989), where this question was just below the surface, the opinion by Judge Richard Arnold ordered the creation of additional majority black districts, holding by implication that visible black representation should trump black influence districts in the circumstances of that case. In *Voinovich* v. *Quilter*, 122 L. Ed. 2d 500, 113 S. Ct. 1149 (1993), the Supreme Court alluded to the question but did not reach it because the district court had found that voting was not racially polarized.[8] Even so, in *Voinovich* the

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8. The Court observed:

> On the one hand, creating majority-black districts necessarily leaves fewer blacks voters and therefore diminishes black-voter influence in predominantly white districts. On the other hand, the creation of

Court allowed an Ohio legislative apportionment plan which packed a super majority of black voters into districts in order to create visible black representation. Some political scientists have referred to this practice as "political ghettoization," in which "black voters are concentrated in a handful of majority-black districts, with little or no influence in the remaining districts." Grofman & Davidson, *Postscript: What Is the Best Route to a Color-Blind Society* in *Controversies in Minority Voting: The Voting Rights Act in Perspective*, 300, 312 (1992).

The Supreme Court has made racially polarized block voting in areas where a majority-minority district is possible the central focus of § 2 jurisprudence. In *Gingles* this method of framing the issue suggests strongly that the creation of majority black districts is the normal remedy for a § 2 violation. This focus led Justice O'Connor in her concurring opinion in *Gingles* to ask: "Is the 'voting strength' of a racial group to be assessed solely with reference to its prospects for electoral success, or should courts look at other avenues of political influence open to the racial group?" 478 U.S. at 88.

Section 2 seems to answer this question. Whatever may be the wisdom of the Congressional policy, it appears that the language of § 2 and its legislative purposes strongly favor the creation of majority black districts and visible black representation, instead of "influence" districts, when block voting is

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majority-black districts can enhance the influence of black voters. Placing black voters in a district in which they constitute a sizeable and therefore "safe" majority ensures that they are able to elect their candidates of choice.

113 S. Ct. at 1156.

racially polarized and there is a history of racial discrimination. The language of the statute creates a "results" test and states that districts should be created in which racial minorities have an "opportunity . . . to elect representatives of their choice." The evidence in the present case, as in many cases, shows that blacks prefer to elect black representatives when they have a choice. The Senate report explaining the language of § 2 says "the presence of minority elected officials is a recognized indicator of access" to the political process under the "results" test. Senate Report at 193. It also says that "the extent to which members of the minority group have been elected to public office in the jurisdiction" in question is a major factor in determining a violation of § 2. Senate report at 206-7. In light of this language, it appears that § 2 opts in favor of visible black representation over other forms of political influence when racial block voting and a history of prior racial discrimination are present, as here. In such instances, § 2 as we interpret it opts for black control of some districts rather than spreading out black "influence" in more districts likely to be represented by white elected officials.

H. Totality of the Circumstances.

When all of the relevant factors are considered, it is clear that the 1992 Senate reapportionment plan violates § 2 of the Voting Rights Act. Plaintiffs have presented strong evidence of racially polarized voting, the most important factor. The state's history of official discrimination in voting, and the lingering effects of discrimination upon the educational and economic status of black citizens of west Tennessee, also weigh in favor of a finding of vote dilution. These factors have all contributed to black candidates' lack of electoral success in west Tennessee. The only factor which clearly weighs in favor of the State is the State's interest in preserving the

integrity of county lines. Consequently, we find that under the totality of the circumstances the 1992 Senate reapportionment plan violates § 2 of the Voting Rights Act by affording black voters in west Tennessee less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

IV.

Having found a violation we must address the remedy. To begin, we enjoined the State from conducting any more elections under the 1992 redistricting plan contained in Chapter 826 of the Public Acts of 1992. The State is ordered to submit a new plan which complies with the Voting Rights Act. The Supreme Court has "repeatedly held that redistricting and reapportioning legislative bodies is a legislative task, which the federal court should make every effort not to preempt." *Wise* v. *Lipscomb*, 437 U.S. 535, 539, 57 L. Ed. 2d 411, 98 S. Ct. 2493 (1978). We also ask plaintiffs to submit alternative plans. We assume that the State will consider the views of the plaintiffs and all other interested parties when drawing a new plan.

The Senate Report indicates that "the remedy fashioned must be commensurate with the right that has been violated . . . so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice." Senate Report at 31. Although other courts have referred to the Senate Report standard in fashioning a remedy, *e.g. Brown*, 722 F. Supp. at 400, the standard does not provide much guidance. We reject the contention that a "complete and full" remedy means drawing districts to achieve maximum possible black representation in the legislature. The explicit rejection in the text of the statute of any right to *proportional* representation indicates that Congress did not

intend to require *maximum* representation. *See Burton* v. *Sheheen*, 793 F. Supp. 1329 (D.S.C. 1992); *Turner* v. *Arkansas*, 784 F. Supp. 553, 557 (E.D. Ark. 1991). The evidence before us indicates that one more majority-black Senate district must be drawn in west Tennessee. A second majority black district would provide sightly more representation that the state's black voting age population require. It would create five black Senate districts in the state or more than 15% of the districts when the black voting age population is 14.4%. The issue of creating a fifth black Senate district should be left to the political judgment of the legislature. It is not required by federal law.

The State may not justify a failure to draw an additional majority-black district based upon the State's assertions at trial that an "effective" majority-black district should contain a black voting-age population of at least 65%. The 65% figure is a guideline devised by the Department of Justice to compensate for minority communities' usually lower voting-age population, lower voter registration, and lower voter turnout. The figure represents a baseline of 50% to which 5% is added for each factor listed above. *See Ketchum* v. *Byrne*, 740 F.2d 1398, 1415 (7th Cir. 1984). New information and changing circumstances justify reexamination of the 65% standard. *Neal* v. *Coleburn*, 689 F. Supp. 1426, 1438 (E.D. Va. 1988). If the State uses voting-age population instead of general population, there is obviously no need to add 5% for lower average voting-age population. Further, the State's voter turnout figures show that black voter turnout in majority-black districts in west Tennessee is higher than white turnout. These figures alone indicate that a district with a 55% black voting-age population would be an "effective" majority-black district. We agree with the statement in *Puerto Rican Legal Defense and Educ. Fund* v. *Gantt*, 796 F. Supp. 681, 694 (E.D.N.Y. 1992), that there is "no bright line

rule for discerning an appropriate VAP [voting-age population] level within a district that passes Voting Rights Act muster.''

The legislature should prepare and submit a new plan by January 25, 1994, the same deadline set in our previous opinion dealing with the House of Representatives filed September 15, 1993, as amended on October 5, 1993. We are confident defendants will be able to meet the deadline we have imposed.

Accordingly, it is so ORDERED this 4th day of November, 1993.

ENTERED BY ORDER OF THE COURT

/s/ GILBERT S. MERRITT
Gilbert S. Merritt
United States Chief Circuit Judge

/s/ BAILEY BROWN
Bailey Brown
United States Senior Circuit Judge

/s/ JEROME TURNER
Jerome Turner
United States District Judge

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

Civil Action No. 92-2407-TUBRO

Judge Merritt *Judge Brown* *Judge Turner*

RURAL WEST TENNESSEE AFRICAN-AMERICAN AFFAIRS COUNCIL, INC., *et al.*,

Plaintiffs,

v.

NED R. MCWHERTER, Governor of the State of Tennessee, *et al.*,

Defendants.

[Filed Nov. 29, 1993]

OPINION OF THREE-JUDGE COURT

Before: MERRITT, *Chief Circuit Judge*; BROWN, *Senior Circuit Judge*; TURNER, *District Judge*.

Plaintiffs, Rural West Tennessee African-American Affairs Council, have moved the court to alter or amend its previous decision in this case. The grounds for the motion are that total population, rather than voting age population, should be the measure for determining minority voting strength in connection with a remedial plan for the State Senate.

The court declines to so alter or amend its opinion in this case. It therefore denies the motion. The statute under which plaintiffs bring this action, 42 U.S.C. § 1973(b) says that "a violation" occurs when minority "members have less opportunity than other members of the *electorate* to participate in the political process . . by the use of the word "electorate" in the statute which the court is interpreting. The court understands the word "electorate" to mean voting age population according to the census figures, not total population.

Accordingly, it is so ORDERED this 29th day of November, 1993.

ENTERED BY ORDER OF THE COURT

/s/ GILBERT S. MERRITT
Gilbert S. Merritt
United States Chief Circuit Judge

/s/ BAILEY BROWN
Bailey Brown
United States Senior Circuit Judge

/s/ JEROME TURNER
Jerome Turner
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

Civil Action No. 92-2407-TU

RURAL WEST TENNESSEE AFRICAN-AMERICAN AFFAIRS COUNCIL, INC., MINNIE BOMMER, JEAN CARNEY, C. T. BOYD, BRENDA WOODS, SHIRLEY KEE, ANNA FAYE MOORE, REV. WILLIAM SMART, and WARREN DICKERSON,

Plaintiffs,

v.

NED R. MCWHERTER, GOVERNOR OF THE STATE OF TENNESSEE, JOHN WILDER, JAMES NAIFEH, WILL BURNS, LENITA MCGRAW, JANET BLACK, JUDY BISHOP, ELLA MAE ESCUE, SPENCE DUPREE, BOBBY WHITE, and LINDA BURNETT,

Defendants.

[Filed Dec 28, 1993]

NOTICE OF CROSS-APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that plaintiffs, Rural West Tennessee African-American Affairs Council, Inc., Minnie Bommer, Jean Carney, C. T. Boyd, Brenda Woods, Shirley Kee, Anna Faye Moore, Rev. William Smart, and Warren Dickerson, pursuant to 28 U.S.C.A. § 1253, cross-appeal to the Supreme Court of the United States from the November 4, 1993, Opinion of the Three-Judge Court, and also from the November 29, 1993, Order of the Three-Judge Court denying plaintiffs' motion to alter or amend.

Dated: December 28, 1993

Respectfully submitted,

LAUGHLIN MCDONALD
NEIL BRADLEY
MARY WYCKOFF
American Civil Liberties Union
Foundation, Inc.
44 Forsyth St. NW -Suite 202
Atlanta, Georgia 30303
(404) 523-2721

/s/ BRUCE KRAMER (7472)
Bruce Kramer
Cooperating Attorney
American Civil Liberties Union
Foundation of Tennessee, Inc.
Borod & Kramer
80 Monroe -7th Floor
Memphis, TN 38103
(901) 524-0221

RICHARD DINKINS
Williams and Dinkins
203 2nd Avenue North
Nashville, TN 37201
(615) 244-3988

/s/ KEENAN R. KELLER
Keenan R. Keller
Davis Polk & Wardwell
450 Lexington Avenue
New York, New York 10017
(212) 450-4933

ATTORNEYS FOR PLAINTIFFS

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

Civil Action No. 92-2407

RURAL WEST TENNESSEE AFRICAN-AMERICAN AFFAIRS COUNCIL, INC.,

Plaintiffs,

v.

NED MCWHERTER, Governor of the State of Tennessee, *et al.*,

Defendants.

PHILLIP R. LANGSDON, *et al.*,

Plaintiffs,

v.

BRYANT MILSAPS, *et al.*,

Defendants.

[Filed Feb. 22, 1994]

ORDER

Before: MERRITT, *Chief Circuit Judge*; BROWN, *Senior Circuit Judge*; TURNER, *District Judge*.

The court reserves judgment in the recently enacted reapportionment plan for the Tennessee House of Representatives until the United States Supreme Court has disposed of its pending appeal of this court's ruling on the apportionment of the Tennessee Senate. The questions presented under § 2 of the Voting Rights Act in the cases and the appeal in the Supreme Court are similar, and the ruling of the Supreme

Court concerning the State Senate will likely control or influence the outcome of the cases attacking the reapportionment of the House of Representatives. Therefore, the 1994 elections for the Tennessee House of Representatives will be conducted under the recently enacted reapportionment statute, and this court will delay consideration of the reapportionment plan for the House of Representatives until after the Supreme Court has disposed of the appeal now pending before it concerning the apportionment of the Tennessee Senate.

Accordingly, it is so ORDERED.

FOR THE COURT

/s/ BAILEY BROWN
Bailey Brown
Senior Circuit Judge

February 22, 1994

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

Civil Action No. 92-2407-TU

RURAL WEST TENNESSEE AFRICAN-AMERICAN AFFAIRS COUNCIL, INC., MINNIE BOMMER, JEAN CARNEY, C.T. BOYD, BRENDA WOODS, SHIRLEY KEE, ANNA FAYE MOORE, REV. WILLIAM SMART, and WARREN DICKERSON,

Plaintiffs,

v.

NED MCWHERTER, in his official capacity as Governor of the State of Tennessee, JOHN WILDER, in his official capacity as Lieutenant Governor and Speaker of the Tennessee Senate, JAMES NAIFEH, in his official capacity as Speaker of the Tennessee House of Representatives, WILL BURNS, in his official capacity as Coordinator of Elections, and LENITA MCGRAW, JANET BLACK, JUDY BISHOP, ELLA MAE ESQUE, SPENCE DUPREE, BOBBY WHITE, and LINDA BURNETT, in their official capacities as Registrars of Fayette, Hardeman, Haywood, Lauderdale, Madison, Shelby and Tipton Counties,

Defendants.

[Filed May 15, 1992]

COMPLAINT

I. The Nature of the Case

1. This is an action to enforce Section 2 of the Voting Rights Act of 1965, 42 U.S.C. 1973, and the First, Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution of

the United States. Plaintiffs seek declaratory and injunctive relief against continued use of the newly enacted legislative districts in Tennessee on the grounds that they dilute minority voting strength. Plaintiffs also seek court-ordered, interim redistricting plans on the ground that the General Assembly has failed to apportion the state's legislative districts in a racially fair manner, and there is not enough time prior to the next elections for the General Assembly to enact a new redistricting plan.

II. Jurisdiction

2. Plaintiffs invoke the jurisdiction of this Court under 28 U.S.C. 1331, 1343(a)(4) and 2201, this suit being authorized by 42 U.S.C. 1973j(f) and 1983. A three judge court is required by 28 U.S.C. 2284(a) to hear plaintiffs' challenge to the constitutionality of the state's legislative districts. Venue is appropriate in this district and division pursuant to 28 U.S.C. 1391(b)(1).

III. Parties

3. Plaintiff RURAL WEST TENNESSEE AFRICAN-AMERICAN AFFAIRS COUNCIL, INC. (RWTAAAC) is a non-profit corporation in Tennessee. Its membership includes African-American county commissioners, city council members, school officials and community leaders from throughout Western Tennessee. Among its goals are insuring that elections for the General Assembly, as well as local and county elections, are held in conformity with the Voting Rights Act, so that there are opportunities for African-Americans in rural West Tennessee to elect candidates of their choice to state office.

4. Plaintiffs Minnie Bommer, Jean Carney, C.T. Boyd, Brenda Woods, Shirley Kee, Anna Faye Moore, Rev. William Smart and Warren Dickerson are African-American residents and registered voters of Tennessee. They desire to participate in the electoral and political processes of Tennessee in a timely manner and on an equal basis with white residents.

5. The personal plaintiffs reside in the seven-county area where new majority African-American legislative districts can be drawn.

6. Defendant Ned McWherter is a resident of Tennessee and is the chief executive officer and Governor of Tennessee. He may on extraordinary occasions convene the General Assembly in extra session, and has the duty of signing or vetoing bills which have passed the General Assembly before they become law. He is sued in his official capacity.

7. Defendant John Wilder is a resident of Tennessee and is the Lieutenant Governor of Tennessee. He is the Speaker of the Senate, one of two branches of the General Assembly in which is vested the legislative power of the state. He is sued in his official capacity.

8. Defendant James Naifeh is a resident of Tennessee and is the Speaker of the House of Representatives, one of two branches of the General Assembly in which is vested the legislative power of the state. He is sued in his official capacity.

9. Defendant Will Burns is a resident of Tennessee and is the Coordinator of Elections. As such, he is the chief administrative election officer of the state, and has general supervisory authority over all elections. T.C.A. 2-11-201, 202. He is sued in his official capacity.

10. Defendants Lenita McGraw, Janet Black, Judy Bishop, Ella Mae Esque, Spence Dupree, Bobby White, and Linda Burnett are the Registrars of Fayette, Hardeman, Haywood, Lauderdale, Madison, Shelby, and Tipton Counties, respectively. The registrars are responsible for the conduct and supervision of elections within their individual counties, and are sued in their official capacities.

IV. Facts

11. The General Assembly has the duty under state law (Tennessee Constitution, Art. II, Section 4) of reapportioning legislative districts in Tennessee every ten years based upon a true and correct enumeration of inhabitants.

12. In April of 1992, the General Assembly passed, and on April 29th the Governor signed, legislation reapportioning the state's house and senate districts.

13. The filing period for legislative seats will close on May 21, 1992.

14. Primary elections for the General Assembly are scheduled for August 4, 1992 and the general election is scheduled for Tuesday, November 3, 1992.

15. African-Americans in Tennessee are sufficiently numerous and geographically compact that they would constitute a majority in one or more single member districts for both houses of the General Assembly.

16. Under the newly enacted reapportionment plan, there are three (3) out of thirty-three (33) senate districts that contain a majority of African-American residents. Only two (2) of those senate seats are in Southwest Tennessee [Fayette, Hardeman, Haywood, Lauderdale, Madison, Shelby and Tipton Counties], although it is possible to draw at least four (4) reasonably compact and contiguous senate districts in that seven county area that contain a majority of African-American residents.

17. Under the newly enacted reapportionment, there are eleven (11) out of ninety-nine (99) house districts that contain a majority of African-American residents. Only eight (8) of those house seats are in Southwest Tennessee [Fayette, Hardeman, Haywood, Lauderdale, Madison, Shelby and Tipton Counties], although it is possible to drawn at least twelve (12) reasonably compact and contiguous house districts in that seven county area that contain a majority of African-American residents.

18. African-Americans in Southwest Tennessee are politically cohesive, in that they tend to vote as a bloc, have common socio-economic characteristics and have organized themselves collectively for political activity.

19. Candidates for elective office preferred by African-Americans in Southwest Tennessee are usually defeated by the white majority voting as a bloc.

20. Historically, African-American residents of Tennessee have been subject to private as well as official discrimination on the basis of race, including discrimination in attempting to exercise their right of franchise and to participate equally with white residents in the political processes.

21. African-American residents of Southwest Tennessee bear the effects of discrimination on the basis of race in education, housing, employment, and health services which have resulted in a lower socio-economic status which hinders their ability to participate effectively in the political process.

22. Voting in Southwest Tennessee is racially polarized.

23. The newly enacted legislative districting in Tennessee dilutes the voting strength of African-Americans.

24. African-Americans have been elected to the General Assembly almost exclusively from districts in which members of their race were the majority.

25. African-Americans in Southwest Tennessee have less opportunity than white residents to participate in the political processes and to elect candidates of their choice.

26. The policy underlying the newly enacted legislative districting in Tennessee is tenuous.

27. The purpose and result of the newly elected legislative redistricting in Tennessee is to deny or abridge the right of African-Americans to vote on the basis on race or color.

28. If the newly elected legislative redistricting plans are used in the 1992 elections, plaintiffs will be seriously injured and their right to vote will be diluted or denied.

29. Plaintiffs have brought this action at the present time to insure that the issues presented herein may be considered in an expeditious manner, and that any remedies for the denial of plaintiffs' rights, including interim, court-ordered elections, may by implemented in an orderly fashion with a minimum of disruption to candidates and voters, and to the electoral process.

30. The defendants' actions complained of herein are under color of law of the State of Tennessee.

First Cause of Action

31. Defendants' action in enacting and implementing the newly created legislative districts in Southwest Tennessee, which result in the denial or abridgement of the right to vote on the basis of race or color, deny plaintiffs' rights guaranteed by Section 2 of the Voting Rights Act, 42 U.S.C. 1973, and the First, Thirteenth, Fourteenth and Fifteenth Amendments of the Constitution of the United States.

Second Cause of Action

32. The newly enacted legislative districts in Southwest Tennessee were enacted with the racially discriminatory purpose of diluting the voting strength of the African-American residents of Tennessee in violation of Plaintiffs' rights guaranteed by Section 2 of the Voting Rights Act, and the First, Thirteenth, Fourteenth and Fifteenth Amendments of the Constitution of the United States.

V. Equitable Relief

33. A real and actual controversy exists between the parties. Plaintiffs have no adequate remedy at law other than this action for declaratory and injunctive relief. Plaintiffs will suffer irreparable injury as a result of the violations complained of and that injury will continue unless declared unlawful and enjoined by this Court.

WHEREFORE, Plaintiffs respectfully pray that this court:

(a) take jurisdiction of this case;

(b) enter a declaratory judgment that the use of the newly enacted legislative districts in Southwest Tennessee violates Section 2 of the Voting Rights Act, 42 U.S.C. 1973, First, Thirteenth, Fourteenth and Fifteenth Amendments to the Constitution of the United States, and enter an injunction against their use;

(c) expedite consideration of this case, and implement interim, court-ordered legislative redistricting to insure that the 1992 primary and general elections are held in a timely manner;

(d) award plaintiffs the costs of this action together with their reasonable attorney's fees; and

(e) retain jurisdiction of this action and grant plaintiffs any further relief which may in the discretion of this court be necessary and proper to ensure that timely and lawful procedures are used in elections in Tennessee for the General Assembly.

This day of May, 1992.

Respectfully submitted,

/s/ KATHLEEN L. WILDE
Kathleen L. Wilde
LAUGHLIN MCDONALD
NEIL BRADLEY
MARY WYCKOFF
American Civil Liberties Union
Foundation, Inc.
44 Forsyth St NW -Suite 202
Atlanta GA 30303
(404) 523-2721

/s/ BRUCE KRAMER
Bruce Kramer, Cooperating Attorney
American Civil Liberties Union
Foundation, of Tennessee, Inc.
80 Monroe, 7th Floor
Memphis TN 38103
(901) 524-0221

RICHARD DINKINS
Williams and Dinkins
203 2nd Avenue North
Nashville TN 37201
(615) 244-3988

ATTORNEYS FOR PLAINTIFFS

No. 93-1379

Supreme Court, U.S.
FILED
APR 4 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

Rural West Tennessee African-American Affairs Council, Inc., Minnie Bommer, Jean Carney, Dr. C.T. Boyd, Brenda Woods, Shirley Kee, Anna Faye Moore, Rev. William Smart, and Dr. Warren Dickerson,

Cross-Appellants,

v.

Ned R. McWherter, Governor of Tennessee, John Wilder, Lieutenant Governor and Speaker of the Tennessee Senate, James Naifeh, Speaker of the Tennessee House of Representatives, Will Burns, Coordinator of Elections, and Lenita McCraw, Janet Black, Judy Bishop, Ella Mae Escue, Spence Dupree, Bobbie White, and Linda Burnett, Registrars-at-Large of Fayette, Hardeman, Haywood, Lauderdale, Madison, Shelby, and Tipton Counties,

Cross-Appellees.

On Appeal From The United States District Court For The Western District Of Tennessee

MOTION TO DISMISS OR AFFIRM

CHARLES W. BURSON*
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

MICHAEL W. CATALANO
Associate Solicitor General
Office of the Attorney General
Executive Offices
500 Charlotte Avenue
Nashville, TN 37243-0497
(615) 741-3499

Counsel for the Appellees

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTIONS PRESENTED FOR REVIEW

1. Whether voting age population is the appropriate numerical basis for assessing the results of an electoral system challenged under 42 U.S.C. § 1973, in light of the use of the word "electorate" in subsection (b) of that statute?

2. After a finding of liability under 42 U.S.C. § 1973, must the remedy require the maximum number of majority-black senate districts to be drawn in the area of violation?

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No. 93-1379

In The

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October Term, 1993

Rural West Tennessee African-American Affairs Council, Inc., Minnie Bommer, Jean Carney, Dr. C.T. Boyd, Brenda Woods, Shirley Kee, Anna Faye Moore, Rev. William Smart, and Dr. Warren Dickerson,

Cross-Appellants,

v.

Ned R. McWherter, Governor of Tennessee, John Wilder, Lieutenant Governor and Speaker of the Tennessee Senate, James Naifeh, Speaker of the Tennessee House of Representatives, Will Burns, Coordinator of Elections, and Lenita McCraw, Janet Black, Judy Bishop, Ella Mae Escue, Spence Dupree, Bobbie White, and Linda Burnett, Registrars-at-Large of Fayette, Hardeman, Haywood, Lauderdale, Madison, Shelby, and Tipton Counties,

Cross-Appellees.

On Appeal From The United States District Court For The Western District Of Tennessee

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 18.6 of the Supreme Court Rules, the cross-appellees (State) move to dismiss this cross-appeal on the grounds that judgment in favor of the State in its appeal pretermits the issues raised in this cross-appeal. The issue of whether total or voting age population is the appropriate numerical basis for assessing the

proportionality of electoral results in a challenge under 42 U.S.C. § 1973 is so insubstantial as not to require plenary review by this Court.

STATEMENT OF THE FACTS

This case involves the Tennessee General Assembly's 1992 redistricting plan for its 33-seat State Senate, Chapter 826 of the Tennessee Public Acts of 1992 (Chapter 826). Under the plan, three State Senate districts contain majority-black population. One, located in Nashville, is not at issue in this case. The other two are in Shelby County (containing the City of Memphis) in southwest Tennessee.

The cross-appellants (plaintiffs) brought this action raising constitutional and statutory challenges concerning "the effect of the 1992 plan on the voting strength of blacks living in west Tennessee." *Rural West Tennessee African-American Affairs Council, Inc. v. McWherter*, 836 F. Supp. 453, 455 (W.D. Tenn. 1993). The statutory claim – decided by the district court – was that Chapter 826 dilutes votes of African-Americans in seven counties in southwest Tennessee in violation 42 U.S.C. § 1973.[1] Specifically, the plaintiffs alleged that (a) an additional majority-black district can and must be created in Shelby County, and (b) an additional majority-black district can and must be created by attaching a portion of Shelby

[1] The area covered by the plaintiffs' claim includes Fayette, Hardeman, Haywood, Lauderdale, Madison, Shelby and Tipton Counties. *Rural West Tennessee*, 836 F. Supp. at 453.

County to portions of six (later, four) other southwest Tennessee counties. *Id.*

All of the plaintiffs' proof on the three preconditions for a vote dilution claim under *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986), was limited to southwest Tennessee. *Id.* In particular, to demonstrate that a compact majority-black district could be created in rural southwest Tennessee (i.e., not wholly within Shelby County), the plaintiffs' submitted two proposed plans. One, submitted during trial, split all six of the rural counties and Shelby County. *Id.* The second plan was submitted after trial, when the plaintiffs concluded that this Court's decision in *Shaw v. Reno*, 113 S.Ct. 2816 (1993), cast doubt on the validity of their first proposed "rural" district. The second plan attaches a piece of Shelby County and a piece of Madison County (reaching up to split the city of Jackson) to all of Haywood, Fayette and Hardeman counties. *Rural West Tennessee*, 836 F. Supp. at 456 n.3.

The district court agreed with the plaintiffs that the Senate plan violated 42 U.S.C. § 1973, holding that Chapter 826 diluted African-American votes by failing to create one additional majority-black seat in southwest Tennessee. The court concluded, however, that Section 2 required the creation of only one additional majority-black district, and not two as urged by the plaintiffs on this cross-appeal. *Rural West Tennessee*, 836 F. Supp. at 467.

The district court began by addressing the three preconditions to a vote dilution claim set forth by this Court in *Gingles* and extended to single-member districts in *Growe v. Emison*, 113 S.Ct. 1075, 1084 (1993). Without

specifically focusing on the "rural districts" proposed by the plaintiffs, the district court first held that the plaintiffs' proposed alternate plans demonstrated the feasibility of additional "geographically compact" majority-black districts. *Rural West Tennessee*, 836 F. Supp. at 457. The court then found that African-American voters in southwest Tennessee were politically cohesive and that white voters in southwest Tennessee usually vote to defeat black voters' preferred candidates. *Id.* 457-60.

The court next examined the various factors bearing on the ultimate "totality of circumstances" judgment about whether African-American voters in southwest Tennessee "have less opportunity than other members of the *electorate* to participate in the political process and to elect representatives of their choice." (Emphasis added) *Id.* at 460-66 (quoting 42 U.S.C. § 1973). In assessing the electoral success of black candidates,[2] the district court held that "the proper scope of review is the entire state." *Id.* at 462. The court further determined that the proper measure of proportionality of black representation was the black *voting age* population, based upon the use of the word "electorate" in 42 U.S.C. § 1973(b). In particular, the court stated the following:

> We agree with the State, however, that the statute uses the word "electorate" and that we

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[2] The important Congressional committee report contemplates consideration of "the extent to which members of the minority group have been elected to public office in the jurisdiction." S. Rep. No. 417, 97th Cong. 2d Sess. 29 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 206 (Senate Report).

should measure the proportionality of black representation on the basis of black voting age population (the electorate) rather than total black population. Blacks represent a higher percentage of the total population than voting age population. The plaintiffs urge that the language of the 1982 amendment to the Act – "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion *in the population*," *Id.* (Emphasis added) – supports a conclusion that total population should be used. Plaintiffs also point to the statement in the Senate Report "[t]he principle that the right to vote is denied or abridged by voting strength derives from the one person, one vote reapportionment case of *Reynolds v. Sims.*" Senate Report at 19. *Reynolds,* noted that "one person" does not mean "one voter," it means one member of the population. *Reynolds v. Sims,* 377 U.S. 533, 560-61, 84 S.Ct. 1362, 1381, 12 L.Ed.2d 506 (1964). *Reynolds,* however, is concerned with ensuring that each district incorporates the same number of people so that voting strength of an individual does not vary by the virtue of the location of his or her residence. The language quoted from *Reynolds* is not related to the redrawing of districting lines on the basis of demographic factors and thus is not relevant to this case. [Citation omitted]. The goal of § 2 is to protect the voting strength of minority groups, which is more accurately reflected by voting age population than total population. The Supreme Court has noted that prevalence of this standard with approval. *See, e.g., Growe v. Emison,* 507 U.S. ___, 113 S.Ct. 1075, 1079, 122 L.Ed.2d 388, U.S. Lexis 1780 (1993) at 25 (noting that "to establish whether a § 2 violation has occurred . . . courts

> have looked to, not the districts total minority population, but the districts minority population of voting age" and citing *Romero v. Pomona*, 883 F.2d 1418, 1425-1426, and n.13 (9th Cir. 1989) (citing cases) and *Gingles*, 478 U.S. at 48, 50, 106 S.Ct. at 2765, 2766).

Id. at 462-63.

From this analysis the district court concluded that the statute required the creation of only one additional majority-black district in southwest Tennessee. *Rural West Tennessee*, 836 F. Supp. at 467. Based on the statewide figures for voting age population – 14.4% of whom are African-Americans – the court ruled that one additional seat was sufficient, giving a total of four out of 33 seats (or 12.1%), and that the statute did not require the state to go above the 14.4% figure to create a second additional or fifth majority-black seat or 15.2%. The district court accordingly enjoined the State from conducting any elections under the 1992 Senate plan and ordered the State to submit a new plan by January 25, 1994. *Id.* at 467. The State appealed that decision to this Court in the case of *McWherter v. Rural West Tennessee African-American Affairs Council, Inc.*, No. 93-1108. A stay request was made to the district court which was denied. Then, a stay request was made to the Circuit Justice for the United States Court of Appeals for the Sixth Circuit. That request was granted on January 20, 1994 pending disposition of the State's appeal.

THE QUESTIONS PRESENTED BY PLAINTIFFS ARE EITHER PRETERMITTED BY THE STATE'S APPEAL OR SO INSUBSTANTIAL AS TO NOT MERIT PLENARY REVIEW

This Court in *Gingles* held that "persistent proportional representation is inconsistent with [the] allegation that the ability of black voters . . . to elect representatives of their choice is not equal to that enjoyed by the white majority." *Gingles*, 478 U.S. at 77. It is the position of the State in its appeal that the district court erred by conducting such a proportionality analysis on a statewide basis instead of focusing on the particular area of the State where the violation has been found. State's Jurisdictional Statement, pp. 8-13 (No. 93-1108). Conducting such a proportionality analysis on a regional basis, as opposed to statewide basis, pretermits the plaintiffs' arguments regarding use of total population versus use of voting age population in that analysis.

The plaintiffs contend that two additional majority-black districts must be drawn – creating a total five majority-black districts – in order to reach proportionality on a statewide basis using total population. However, the addition of two majority-black districts in southwest Tennessee increases the number of majority-black districts in southwest Tennessee to a total of four districts. Those four majority-black Senate districts represent 12.12% of the 33 seats of the Tennessee State Senate. The total black population for southwest Tennessee in comparison to the entire State's population is only 8.8%.[3] Thus, the creation

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[3] The total population of Tennessee is 4,877,155. The total black population of southwest Tennessee is 430,102.

of two additional majority-black districts in southwest Tennessee would be well beyond the proportion of total black population of southwest Tennessee in relation to total population of the entire State.[4] Accordingly, if the State is correct that the proportionality analysis should focus on the affected region rather than the entire State, the issue of use of voting age population versus total population in conducting that analysis is of no consequence.

In addition to the issues in this cross-appeal being pretermitted by the State's appeal, the question of whether "electorate" means voting age population or total population is an insubstantial one which does not merit plenary review by this Court. The plaintiffs urge that, in Voting Rights Act cases, the word "electorate" should have "an expansive meaning that means both 'voters' and 'population' ". Plaintiffs' Jurisdictional Statement, p. 14. Such an argument ignores the plain and clear meaning of the word "electorate."

The plaintiffs admit that the word "electorate" means less than the total population.[5] This Court has held on a

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[4] Indeed, such a result would constitute a maximization of minority voting strength, a result expressly precluded by the proviso in 42 U.S.C. § 1973(b): "[n]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." As the Senate Report states, this provision is intended to "put to rest any concerns that have been voiced about racial quotas." Senate Report at 31.

[5] Plaintiffs' Jurisdictional Statement, p. 13 n.10. Contrary to the plaintiffs' assertions, "electorate" does not necessarily mean registered voters or actual voters but is "the body of persons

number of occasions that "the plain meaning of legislation should be conclusive, except in the 'rare cases' in which the literal application of the statute will produce a result demonstratively at odds with the intention of the drafters." *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982). To say that the word "electorate" means the same as total population runs contrary to the plain meaning of the word.

Furthermore, there is no indication in the legislative history that the drafters intended "electorate" to mean total population. In fact, the language upon which the 1982 amendment is based derives from a test developed by this Court in the case of *White v. Regester*, 412 U.S. 755 (1973). The plaintiff's burden of proof in a Voting Rights Act case was to produce evidence that supported findings that "the political processes leading to the nomination and election were not equally open to participation by the group in question – that its members had less opportunity than other *residents* in the district to participate in the political process and to elect legislators of their choice." *Id.* at 766. (emphasis added) The word "residents" as used by this Court in the *White* decision was changed to "electorate" in the 1982 amendments. Had Congress intended total population to be used in such analysis, it could have easily retained the word "resident", but it did not.

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entitled to vote in an election" which is the voting age population. *Webster's Encyclopedia Unabridged Dictionary*, p. 459 (1989).

The plaintiffs point to the statement in the Senate Report that "[t]he principle that the right to vote is denied or abridged by dilution of voting strength it derives from the one person, one vote reapportionment case of *Reynolds v. Sims.*" Plaintiffs' Jurisdictional Statement, p. 11 quoting Senate Report at 19. From this statement, the plaintiffs conclude that total population, not voting age population is the appropriate standard in light of the fact that total population was the standard for a "one person, one vote" challenge in *Reynolds v. Sims*, 377 U.S. 533 (1964).

The district court correctly rejected this argument, stating that – whatever the constitutional focus may be – "[t]he goal of § 2 of the Act is to protect the *voting strength* of minority groups, which is more accurately reflected by voting-age population than by total population." *Rural West Tennessee*, 836 F. Supp. at 463 (emphasis added). Indeed, the plaintiffs' position is inconsistent with the very nature of their "vote dilution" claim. As *Gingles* explains, such a claim is about the submergence of *voting ability* of a minority group in the results of the majority's *voting*. *Gingles*, 478 U.S. at 55-56. Not surprisingly, then, as the district court pointed out, this Court has noted with evident approval that lower courts regularly use voting age population figures in applying § 2. *Rural West Tennessee*, 836 F. Supp. at 463.[6]

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[6] We also note that it is not settled that total population must be used for equal protection clause purposes. This Court stated in *Burns v. Richardson*, 384 U.S. 73, 91 (1966) that "the Equal Protection Clause does not require the states to use total population figures derived from the federal census as the standard by which this substantial population equivalence is to be

To suggest some doubt on the issue, plaintiffs point to only two decisions of district courts, but neither of the decisions considered this issue. Ironically, the plaintiffs first cite to the case of *Nash v. Blunt*, 797 F. Supp. 1488 (W.D. Mo. 1992), *affirmed*, 113 S.Ct. 1809 (1993), for the proposition that total population rather than voting age population should be used in determining proportionality. But, the *Nash* Court, while apparently using total population, did so without consideration of any argument that voting age population was the proper proportional benchmark for assessing representation. *Id.* at 1498-99. Moreover, as the State indicated in its Jurisdictional Statement in this case, the *Nash* decision specifically supports the use of *regional*, not statewide, figures in viewing proportional representation. State's Jurisdictional Statement, p. 7 (No. 93-1108). *See also, Nash*, 797 F. Supp. at 1499 ("there is no authority to suggest that these citizens' inability to be included together in one or more districts should be 'made up' by increasing the number of minority-controlled districts in those areas of the state

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measured." The Court went on to say that neither in *Reynolds* nor in another decision had it suggested that states are required to include "aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime in the apportionment based by which their legislators are distributed." *Burns*, 384 U.S. at 92. The Court did indicate that the "[u]se of a registered voter or actual voter basis presents an additional [constitutional] problem [because] [s]uch a basis depends not only upon criteria such as govern state citizenship, but also the extent of political activity of those eligible to register and vote." *Id.* The use of voting age population, of course, would not present such constitutional problems because political participation through voter registration is not considered.

where black citizens are most concentrated.") Following *Nash*, therefore, would defeat plaintiffs' claim.

In *Jeffers v. Clinton*, 730 F. Supp. 196 (E.D. Ark. 1989), *appealed dismissed*, 498 U.S. 1129 (1991) a district court also apparently used "total population" in its proportionality analysis. Again, however, there was no discussion regarding the use of total population versus voting age population. Simply stated, the issue does not appear to have even been raised by the parties in *Jeffers* anymore than in *Nash*. These cases thus create no conflict with, and raise no substantial question about the correctness of, the district court's determination to use voting age population instead of total population in its proportionality analysis. *See* R. Stern, E. Gressman, S. Shapiro, & K. Geller, *Supreme Court Practice* § 4.3 (7th Ed. 1993) ("There must be a real or intolerable conflict on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized.")

Finally, the plaintiffs argue that the use of a proportionality analysis after finding of liability "was not meant to function as an inflexible limitation on [the remedy]." Plaintiffs' Jurisdictional Statement, p. 15. Although the plaintiffs deny it, this argument leads to the inescapable conclusion that if a majority-black district can be drawn and a violation has been found, then such a district must be drawn. In other words, the voting strength of minority voters must be maximized. As the district court stated, "[t]he explicit rejection in the text of the statute of any right to *proportional* representation indicates that Congress did not intend to require *maximum* representation." *Rural West Tennessee*, 836 F. Supp. at 467. *See also, Burton v.*

Shehan, 793 F. Supp. 1329 (D.C. S.C. 1992); *Turner v. Arkansas*, 784 F. Supp. 553, 557 (E.D. Ark. 1991).

CONCLUSION

Based upon the foregoing authorities and analysis, the State urges this Court to dismiss the jurisdictional statement of the plaintiffs or, in the alternative, to affirm the district court's decision with regard to those issues raised in this cross-appeal.

Respectfully submitted,

CHARLES W. BURSON
Attorney General and Reporter

MICHAEL E. MOORE
Solicitor General

MICHAEL W. CATALANO
Associate Solicitor General
Attorney General's Office
Executive Offices
500 Charlotte Avenue
Nashville, Tennessee 37243-0497
(615) 741-3499

(3)

No. 93-1379

Supreme Court, U.S.
FILED
MAY 4 1994
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

RURAL WEST TENNESSEE AFRICAN-AMERICAN AFFAIRS COUNCIL, INC., *et al.*,

Appellants,

v.

NED R. McWHERTER, Governor of Tennessee, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE

REPLY BRIEF

LAUGHLIN MCDONALD*
NEIL BRADLEY
MARY WYCKOFF
American Civil Liberties Union Foundation, Inc.
44 Forsyth St. NW -Suite 202
Atlanta GA 30303
(404) 523-2721

RICHARD DINKINS
WILLIAMS AND DINKINS
203 2nd Avenue North
Nashville, TN 37201
(615) 244-3988

BRUCE KRAMER
Cooperating Attorney
American Civil Liberties Union Foundation of Tennessee, Inc.
BOROD & KRAMER
80 Monroe — 7th Floor
Memphis, TN 38103
(901) 524-0221

KEENAN KELLER
DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, NY 10017
(212) 450-4933

* Counsel of Record

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ARGUMENT

In attempting to summarily dismiss the issues presented in RWTAAAC Appellants' Jurisdictional Statement as insubstantial, Appellees cite no relevant cases and offer no analysis as to why voting age population ("VAP") should constitute the appropriate basis for determining the representative fairness of a remedial redistricting plan. Appellees' Motion to Dismiss or Affirm has failed to address the substance of the Jurisdictional Statement, lacks serious merit, and should be denied. The Court should note probable jurisdiction over the issues presented herein.

I.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

As demonstrated in RWTAAAC's Jurisdictional Statement, this appeal presents issues of critical importance to the interpretation and enforcement of the Voting Rights Act. The three-judge district court below erred in applying the basis used to determine whether effective majority-minority districts can be drawn to meet a plaintiff's threshold liability burden of proof (VAP) with the basis used to determine whether there is fair minority representation in a representative body (total population). *See Thornburg* v. *Gingles*, 478 U.S. 30, 50 & n.17 (1986) (first prong of threshold factors). The court then erroneously used proportional representation, based on VAP, as an inflexible cap on the remedy for discriminatory vote dilution. These rulings have resulted in the court's failure to order a full and complete remedy for the violations that it found, two majority-minority districts, rather than one district, depriving African-Americans in rural west Tennessee of the *opportunity* to participate equally in the political process and elect representatives of their choice.

A. The Decision of the Three-Judge Court Conflicts With the Decisions of this Court and other Federal Courts.

This Court has held that total population is the proper basis for determining the representative fairness of redistricting plans.[1] Decisions of the lower courts are to the same effect. Plaintiffs' J.S. at 10. Rather than arguing this contention, or citing cases consistent with the ruling of the district court, Appellees merely assert that the district court cases cited did not directly address the issue. Defendants' Motion at 11. This response fails to address the substance of Plaintiffs' J.S. and lacks merit.

The decision of the three-judge court fundamentally conflicts with the analysis and holding in *Garza* v. *County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991). Despite the fact that the vote dilution principle in Section 2 derives from the one-person, one-vote reapportionment case of *Reynolds* v. *Sims*, the district court here erroneously dismissed as irrelevant that line of caselaw, misreading *Beer* v. *United States*, 425 U.S. 130, 142 n.14 (1976), a Section 5 case. In *Garza* both the majority and dissent rely on the analysis in *Reynolds* v. *Sims* and its progeny in discussing the issue whether total population or VAP forms the correct basis for reapportionment. Reasoning from *Reynolds* v. *Sims*, the Garza Court held that:

> people, including those who are ineligible to vote, form the *basis* of representative government. Thus population

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1. *See, e.g., Thornburg* v. *Gingles*, 478 U.S. at 74 n.35, 77; *United Jewish Organizations, Inc.* v. *Carey*, 430 U.S. 144, 166 (1977); *Beer* v. *United States*, 425 U.S. 130, 137 (1976); *Whitcomb* v. *Chavis*, 403 U.S. 124, 149 (1971); *see also* Plaintiffs' J.S. at 10-11.

> is an appropriate basis for state legislative reapportionment.

918 F.2d at 774 (emphasis added).

The three-judge court below selected VAP as the basis for measuring representative fairness without reference to *Reynolds* v. *Sims* and its progeny. This finding conflicts with Voting Rights Act and one-person, one-vote cases which focus on equalizing total population as a means of ensuring representative fairness. Without doubt, this conflict presents a substantial issue for review by this Court and forms the basis for reversal of the lower court ruling.

B. The Three-Judge Court Below Erroneously Relied on the Term "Electorate" in Applying VAP as the Numerical Basis for Determining Representative Fairness.

Appellees did not attempt, and cannot, show that courts have consistently utilized VAP as the basis for determining representative fairness in redistricting plans.[2] Appellees' response to the contention that the three-judge court erred in

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2. Appellees cite *Burns* v. *Richardson*, 384 U.S. 73, 91-92 (1966), for the proposition that the Equal Protection Clause seems to permit states to use a basis other than total population in constructing electoral districts. Defendants' Motion at 10 n.6. The *Burns* opinion, however, is narrowly drafted to address the constitutionality of an interim redistricting plan. Of all the possible reapportionment bases mentioned in the case, VAP was never considered as an option. Further, *Burns* has no relevance to this case. The Tennessee Constitution mandates that state legislative districts be drawn on the basis of total population. Tennessee Const. art. 2 § 4. A consistent basis must be used for both reapportionment and in determining the representative fairness of the state's redistricting plan. Plaintiffs' J.S. at 18-19.

interpreting "electorate" as VAP and then applying VAP as the basis for determining representative fairness is merely to restate the findings of the lower court.[3] Defendants Motion at 10. In arguing a literalist approach to statutory interpretation, Appellees apparently miss the point that the word electorate has a more restrictive meaning than voting age population, undercutting the merit of the court's reliance on the definition of the word in interpreting Section 2.

The definition of the word electorate does not control the interpretation of Section 2. As Appellants have noted, electorate is more properly defined as registered voters, actual voters or even the district itself, as opposed to voting age population. Plaintiffs' J.S. at 13. The arbitrariness of the district court's decision to equate the word electorate with VAP is illustrated by the one-person, one-vote cases, from which the vote dilution principle derives, and the legislative history of the 1982 amendment of Section 2. *Id.* at 14. The phrase "one-person, one-vote" has been consistently interpreted and applied as a requirement that electoral districts have roughly equal populations — not equal numbers of registered voters or VAP. *See, e.g., Reynolds* v. *Sims*, 377 U.S. 533, 560-61 (1964). This Court has noted that:

> *Reynolds* v. *Sims*, of course, dealt with more than the statistical niceties involved in equalizing individual voting strength. *** More fundamentally, Reynolds recognized that "the achieving of fair and effective representation

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3. Appellees fail to address the contention that the three-judge court erred in relying on cases applying the VAP standard in the first prong of the *Gingles* threshold conditions to remedy. Again, Appellees merely repeat the court's findings. Defendants' Motion at 10. As Appellants have noted, VAP is relevant for the specific purpose of determining the "electoral potential" of a minority community. Plaintiffs' J.S. at 12.

> for all citizens is . . . the basic aim of legislative apportionment," and it was for that reason that the decision insisted on substantial equality of populations among districts.

Gaffney v. *Cummings*, 412 U.S. 735, 748 (1973) (citation omitted). Applying a restrictive definition of Section 2 would reduce the protection of minority voting rights and be totally at odds with the remedial purpose of the Voting Rights Act. *See South Carolina* v. *Katzenbach*, 383 U.S. 301, 315 (1966).

C. Appellees Maximization Argument Misapprehends the Focus of the Voting Rights Act.

RWTAAAC Appellants have a right to a full remedy for the discriminatory vote dilution found by the district court. Plaintiffs' J.S. at 17-18. Appellees' maximization argument is a strawman set up to cloud the remedy issues in this case. By failing to focus on the Voting Rights Act's protection of equality of *opportunity*, as opposed to proportional electoral *result*, both Appellees and the three-judge court erroneously link the concept of full remedy for vote dilution with the idea of maximizing minority electoral result. Defendants' Motion at 12.

As Appellants have noted, Section 2 protects the equal opportunity to participate in the political process and to elect representatives of choice. Plaintiffs' J.S. at 17. The Section 2 proportionality disclaimer rejects "a right to have *members of a protected class* elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973 (emphasis added). Appellees' maximization argument is grounded on the text of the proportionality disclaimer. Defendants' Motion at 12. The disclaimer does not limit the opportunity to elect as a remedial issue. Plaintiffs' J.S. at 16-17. Appellants have never argued for the right to elect African-Americans in proportion to their total population, but rather seek the

opportunity to elect representatives of their choice, as protected by the Voting Rights Act.[4] Full remedy for vote dilution, not maximizing electoral result, is the issue in this case. Drawing majority-minority districts levels the political playing field but does not guarantee a particular result.

The three-judge court erroneously relied on similar maximization reasoning to impose an inflexible cap on Appellants' remedy for discriminatory vote dilution under the State Senate redistricting plan. As Appellants have argued, the court erred in applying this inflexible remedy limitation and in failing to order the full and complete remedy for vote dilution required by Section 2, where one was available. Plaintiffs' J.S. at 15-16. This error should be addressed on appeal to ensure that flexibility guides the exercise of federal remedial powers, allowing the full remedy for judicially-determined vote dilution.

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4. The distinction between the concepts of protection of "equal opportunity" and "proportional electoral result" is significant. Appellees' link between maximization and full remedy for discriminatory vote dilution assumes that the candidate of choice in the resulting majority-minority district will always be minority. Such an assumption is both erroneous and socio-politically problematical.

II.

THE QUESTIONS PRESENTED ARE FUNDAMENTAL TO THE INTERPRETATION OF THE VOTING RIGHTS ACT AND, THEREFORE, ARE NOT PRETERMITTED BY THE LIABILITY APPEAL

The question whether total population, as opposed to voting age population, is the correct basis for determining the representative fairness of remedial redistricting plans is fundamental to Section 2. At issue here is the manner in which the concepts of representative equality and electoral equality impact on the remedy for judicially-determined vote dilution under the Voting Rights Act. *See, e.g., Garza* v. *County of Los Angeles*, 918 F.2d at 773-76. Regardless of whether a statewide or regional[5] focus is dictated by the cases under submission, the resolution of the questions presented will have an impact on this and subsequent cases and will give guidance to representative bodies charged with the responsibility of reapportionment.

Appellees have grounded the liability appeal on the hope of a favorable change in law following this Court's decision in *Johnson* v. *De Grandy*, No. 92-519 (and related cases). As argued in the Plaintiffs' Motion to Dismiss or Affirm the appeal of the liability findings, no matter how the statewide

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5. Appellees' regional analysis is a transparent attempt to manipulate the reapportionment data. Appellees tout a regional analysis but, in reality, fail to make a regional comparison. Statewide, rather than regional data, forms the basis for their comparisons. The number of majority African-American State Senate seats in southwestern Tennessee is compared to the total number of seats statewide and the region's total African-American population is compared to the state's total population. Defendants' Motion at 7.

percentages issue in *De Grandy* may be decided, that case is factually and fundamentally distinguishable from the instant case. *Id.* at 8.

Appellees have gone to great lengths to mischaracterize RWTAAAC's claims, particularly those below, in an attempt to make this case resemble those under submission. Appellants, however, challenged the entire State Senate redistricting plan and presented substantial evidence of vote dilution and African-American voter cohesion outside southwestern Tennessee. Plaintiffs' J.S. at 3-6. Appellants proposed compact districts in southwestern Tennessee because that was where the districts could be drawn.[6] The liability findings of the court below do not conflict with the decisions of other lower courts. Plaintiffs' Motion at 9-10. Appellees' liability appeal is based upon a prospective change in law. Notwithstanding the merits of the cases under submission, this case will continue to present substantial questions for review.

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6. Appellees' compactness objection to the proposed State Senate districts is groundless. Appellants' proposed rural senate district includes parts of five counties and is 86 miles in length, compared to the districts adopted by the state that includes eight counties and stretches 120 miles. Plaintiffs' Motion at 16.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction in this action and set the case for argument.

Respectfully submitted,

LAUGHLIN MCDONALD*
NEIL BRADLEY
MARY WYCKOFF
American Civil Liberties Union Foundation, Inc.
44 Forsyth St. NW -Suite 202
Atlanta, GA 30303
(404) 523-2721

BRUCE KRAMER
Cooperating Attorney
American Civil Liberties Union Foundation of Tennessee, Inc.
BOROD & KRAMER
80 Monroe — 7th Floor
Memphis, TN 38103
(901) 524-0221

RICHARD DINKINS
WILLIAMS AND DINKINS
203 2nd Avenue North
Nashville, TN 37201
(615) 244-3988

KEENAN KELLER
DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, NY 10017
(212) 450-4933
Attorneys for Appellees

* Counsel of Record

Dated: May 4, 1994